

A
DIGEST
OF THE
Laws of England

IN REAL PROPERTY.

By WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE FIFTH.

CONTAINING

Title 35. FINE.

36. RECOVERY.

37. ALIENATION BY CUSTOM.

LONDON:

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, FLEET-STREET,
AND
J. COOKE, DUBLIN.

1805.

C O N T E N T S

OF THE

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A
DIGEST
OF THE
Laws of England
REGULATING
REAL PROPERTY.

TITLE XXXV.

FINE.

CHAP. I.

Of the Origin and Nature of Fines.

CHAP. II.

Of the Manner of levying Fines.

CHAP. III.

Of the several Sorts of Fines.

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CHAP. V.

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CHAP. XIV.

How Fines may be reversed and avoided.

CHAP. I.

Of the Origin and Nature of Fines.

§ 1. *Origin of Fines.*

6. *Description of.*

§ 9. *Fines taken from the civil Law.*

12. *When first adopted.*

Section 1.

When landed property first became the subject of alienation, it was found necessary to adopt some authentic mode of transfer, which might secure the possession, and ~~give~~ the title of the purchaser.

Original
Fines.

By the antient common law, a charter of feoffment was, in general, the only written instrument, whereby lands were transferred or conveyed : but, although this assurance derived great authenticity, from the number of witnesses by whom it was usually attested, and the solemn and public manner in which livery of seisin was given, yet still it may be supposed that inconveniences would frequently arise, either from the loss of the charter itself, or from the difficulty of proving it after a lapse of years ; these circumstances, probably, induced men to look out for some other species of assurance, which should be more solemn, more lasting, and more easy to be proved, than a charter of feoffment.

§ 2. Experience must soon have discovered, that no title could be so secure and notorious as that which had been questioned by an adverse party, and ratified by the determination of a court of justice ; and the ingenuity of mankind soon found out a method of deriving the same advantage from a fictitious process.

To effect this purpose, the following plan was adopted : a suit was commenced concerning the lands in-

tended to be conveyed, and when the writ was sued out, and the parties appeared in court, a composition of the suit was entered into, with the consent of the judges, whereby the lands in question were declared to be the right of one of the contending parties.

§ 3. This agreement being reduced into writing, was inrolled among the records of the court, where it was preserved by the proper officer, by which means, it was not so liable to be lost ~~or~~ defaced, as a charter of feoffment, and, being a record, would at all times prove itself. It had also another advantage, that, being substituted in the place of the sentence which would have been given, in case the suit had not been compounded, it was held to be of the same nature, and of equal force with the judgment of a court of justice.

Glanvill
lib. 2. c. 20.
Bract. 256 a.
& b.

§ 4. When this species of agreement was completed, a writ issued of course to the sheriff of the county in which the lands lay, in the same form as if a judgment had been obtained in an adversary suit, directing him to deliver the possession to the person who thus acquired the lands.

§ 5. The form which was first adopted in this species of assurance, has continued ever since. To shew the tenor thereof, and the difference between it and the charters which were then in use, it shall be transcribed.

* There is a record of a fine in *Dugdale's Origines Juridicales*, page 92. dated 28 Hen. 2. anno 1182, which is expressly mentioned to have been levied, because the charter of feoffment, by which the lands had been conveyed, was lost.

Hæc est finalis concordia facta in curia domini regis apud Westmonasterium, in vigilia beati Petri apostoli, anno regni regis Henrici secundi, tricesimo tertio, coram Ranulpho de Glanville, justiciario domini regis, et coram H. R. W. et T. et aliis fidelibus domini regis qui ibi tunc aderant, prior et fratres hospitalis Hierusalem et W. T. filium Normanum et Alanum filium suum, quem ipse attornavit in curia domini regis ad lucrandum et perdendum, de tota terra illa et de pertinentiis de qua terra tota placitum fuit inter eam et curia domini regis : scilicet quod prædicus W. et Alano concedunt et testantur donationem quam Normanus pater ipsius W. ipsis inde fecit, et illam terram totam quietam clamant de se et hæredibus suis domus hospitalis et prefato priori et fratribus in perpetuum et per liberum servitium quatuor denariorum per annum pro omni servitio et pro hac concessione et testificatione et quæta clamantia prefatus prior et fratres hospitalis dederunt ipsi Wilhelmo et Alano centum solidos sterlingorum.

Glan. lib. 8.
c. 2.

§ 6. This species of assurance was called *finis*, or *finalis concordia*, from the words with which it begins, and also from its effect, which is to put a final end to all suits and contentions.* It may be described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and inrolled among

Description
of.

* Et nota quod dicitur talis concordia finalis, eo quod finem imponit negotio, adeo ut neuter litigantium ab ea de cetero poterit recedere. Glan. lib. 8. c. 3. Finis est extremitas unius cujusque rei, et ideo dicitur finalis concordia quia imponit finem litibus. Bradl. 435.

the records of the court, where the suit is commenced, by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements.*

§ 7. To this mode of transferring estates freehold, at common law, the ceremony of livery of seisin is unnecessary, not because the supposition and acknowledgement thereof in a court of record induces an equal notoriety, for in ancient fines no such acknowledgement is made; but because lands acquired in this manner were supposed to be recovered by sentence of a court of justice, and the possession was delivered by the sheriff, in pursuance of a writ directed to him for that purpose, which was equal in point of notoriety to the ceremony of livery.

Ante f. 4.

§ 8. A fine was from its first institution more highly favoured and protected by the law, than any other kind of assurance; for if either of the parties refused to adhere to it, there was a particular writ by which

* *Finis primo dicitur ritus ille sollemnis transferendorum prædiorum in curia regis civilium causarum quo nihil sanctius habetur vel augustius ad alienationes et hereditates stabiliendas.*—*Transactionis coram rege duo erant genera, unum simplici ejus charta enunciatum et testatum, aliud tanquam e composita lite proveniens rei judicati formam exhibet ideoque finis dictum quasi litis terminus. Sed genus alterum (qui finis dicitur et finalis concordia) magis placuit quod præter testionis magnificentiam, non solum ad stabiliendas transactiones sed ad rescindendas lites maxime valet, ideoque ab emptoribus terrarum tanquam sacra anchora culta et admirata.* Spelman's Gloss, voce *Finis*.

they were compelled to appear, called *querela de fine facto in curia domina regis*. And if the fine was proved to have been duly levied, then the party who refused to adhere to it, was attached, till he found sufficient security for his compliance.*

Glanv. lib. 1.
c. 3. lib. 8.
c. 3, 4, 5.

§ 9. The idea of a fine appears to have been originally taken from the *Transactio* of the Civilians, which was an accommodation of a suit already commenced, or an agreement respecting some doubtful matter, that would otherwise be the subject of a suit. *Transactio est super re dubia, aut lite incerta, conventio non gratuita, aliquo dato, retento, vel promisso*.

Fines taken from Law.

Voet, Comp. Jur. 51.

§ 10. Although no modern writer on the *English* law has taken notice of this circumstance, yet the definition of a fine, given by *Bracton*, seems to be an undoubted proof of it. *Concordia in foro seculari idem est quod Transactio, et est Transactio de Re dubia et lite incerta, aliquo dato, vel promisso, vel retento, alite Transactio*. From the similarity of these definitions, it appears clearly that the *English* lawyer copied from the *Roman*; nor should it appear extraordinary that we are indebted to the civil law for this most useful species of

Bract. 310.
a & b.

* In some cases, however, the civil authority was insufficient for this purpose. Thus, Mr. *Maddon* has transcribed a record, by which it appears that *Julian de Swadefield*, fined to King *John* in 100 marks and six palfreys, *per sic quod finis factus per cyrographum et per finem duelli, inter ipsum, et Wilhelmum de Curton, de feudo unius militis et dimidii cum pertin' in Ellingham coram iussiciariis teneatur*.

Vide Glanv.
Proh. & lib.
7. c. 1.
Selden ad
Fletam.

assurance, when we consider how much our first writers, *Glanville* and *Bracton*, have borrowed from *Justinian's Code*, although some of the more modern authors appear, either to have been ignorant of the obligations we owe to the *Romans* in this respect, or to have, from a mistaken pride, been extremely unwilling to acknowledge them. Lord *Coke*, however, seems not to have been ignorant of the origin of fines; for, speaking of their etymology, he says,—
“ And the Civilians call this *Judicial Concord*, *Trans-*
“ *actionem Judicialem de re immobili.*”

Inst. 262 a.

Antiq. Med.
Æv. Tom. 9.
pa. 449. Id.
463. 487.

§ 11. The word *finis* appears to have been used as synonymous to *transactio* in the twelfth century; of which several charters published by *Muratori* afford a proof. A part of one of them shall be transcribed. *Transactio inter Gerardum Comitem, &c. atque Attonum Archiepiscopum Pisenum, anno 1121.*—*In Eterni Dei Nomine, Amen. Breve Recordationis qualiter Guardus Comes, &c. Finem fecit et Transactionem Gratiano Vicedomino ad partem Ecclesiæ Archiepiscopatus Sancte Marie et Vice Attoni ejusdem Ecclesiæ Archiepiscopo, &c. de quinque Partibus integris de Curte de Bellora, &c.*

When first
adopted.

Coke Read. 1.
Plowd. 368.

§ 12. It has been a favourite topic with our lawyers to enlarge very much on the antiquity of fines: some have carried this idea so far as to insist, that they were coeval with the first rudiments of the law, and formed an original assurance; others have contended that fines were well known in this kingdom before

before the *Norman* conquest.* But if it be admitted that the first idea was derived from the civil law, and we trust this fact has been fully proved; it will follow that fines could not possibly have been known in *England* until some time after the year 1230, when a copy of the *Pandectæ* was found at *Amalphi* in *Italy*; in consequence of which discovery, the study of the *Roman* law spread with uncommon rapidity over all *Europe*, not excepting this island, in which *Roger* firnamed *Vacarius* was brought over by *Theobald* a *Norman* abbot, elected to the see of *Canterbury* in the year 1147, read public lectures at *Oxford* on the *Roman* law.

Selden ad
Fletam, c. 7.
f. 3.

§ 13. As a farther proof of this assertion, it may be observed that *Dugdale* and *Madox*, the two most diligent and learned enquirers into our ancient records and charters, have acknowledged, that they could not discover any traces of fines in this country before the reign of *Hen. 2.* who ascended the throne in 1155, that is, thirty-four years after the introduction of the *Roman* jurisprudence; so that there can scarce remain a doubt but that fines were first adopted in *England* during the reign of *Stephen*, or his immediate successor, *Hen. 2.* And that we are indebted to *Justinian's* Code for this part of our law.

Orig. Jur. 92.
Formul. Ang-
lic Dissert.
f. 15.

* It was not unusual in the *Anglo Saxon* times, for persons to execute their contracts in the county court, where they were witnessed, of which *Hickes* in his *Dissertatio Epistolaris*, p. 29, 30, published in the *Thesaurus Linguarum Septentrionalium*, has produced two instances, but they bear no sort of resemblance to fines.

TITLE XXXV,

FINE.

6

CHAP. II.

Of the Manner of levying Fines.

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| <p>§ 1. <i>Antient Manner of levying Fines.</i>
 7. <i>Modern Manner.</i>
 9. <i>Original Writ.</i>
 19. <i>Licentia Concordæ &c.</i>
 20. <i>King's Silver.</i>
 29. <i>Concord.</i>
 47. <i>Foot or Chirograph.</i>
 52. <i>All the Proceedings on Fines must be recorded.</i>
 54. <i>No Averment against the Chirograph.</i></p> | <p>§ 56. <i>Provisions to prevent Fines from being completed.</i>
 58. <i>Of the Proclamations.</i>
 68. <i>Felony for one Person to acknowledge a Fine in the Name of another.</i>
 69. <i>At what Time a Fine is completed.</i>
 72. <i>When a Fine begins to operate.</i></p> |
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Section I.

Antient Manner of levying Fines.

A FINE has, in the preceding chapter, been described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and inrolled among the records of the court, where the suit was commenced; by which, lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements,

§ 2. There is no small difficulty in ascertaining the manner in which fines were originally levied, on account of the scarcity of materials for such an enquiry; for,

for, except what is to be found in the dissertation which *Madox* has prefixed to his Collection of Antient Charters, and the few observations which *Dugdale* has made on this subject in his *Origines Juridicales*, nothing has been collected, either by our lawyers or antiquaries.

§ 3. *Madox* seems to have thought, that a fine was not originally an accommodation of a suit, in the strict sense of the word, because, in some of the most antient fines extant, the original writ appears to have been sued out, not any process used, for the purpose of bringing the parties before the court; but they themselves having accommodated the matters in dispute, and drawn up an agreement in writing called a *chirographum*, which signified a deed of two parts, written on the same piece of paper or parchment, they then appeared in a court of justice, where they acknowledged it as their agreement, and mutually set their seals to it; and, upon payment of a certain fine, it was inrolled among the records of the court. Or else the parties entered into an agreement in court, where it was immediately reduced into the form of a *chirographum*, and recorded, and a copy delivered to each of the parties,

1 Infl. 143 B.
n. 4. Fleta
lib. 3. c. 14.
3 Rep. Pref.

§ 4. This idea is confirmed by the opinion of the judges in the abbot of *Merton's* case, who said, that a fine was nothing more than a covenant between the parties, recorded by the justices; and if it were before justices of record, the parties being present, it was sufficient; for the writ was sued out, only to make the

Year Book,
Pasch.
21 Ed. 4.
fo. 4. No. 8.
Mich. fo. 60.
No. 32.

the parties appear; and if they were present, and would appear gratis, it was unnecessary to sue out a writ, but they might make a final covenant by record of the justices, and a fine was but a covenant of record: from whence, it may be contended, that fines were at first exactly similar to the agreements which, in the time of the *Anglo-Saxons*, were entered into at the county courts; but a fine differs from those agreements in two very material circumstances: first, nothing appears to have been paid for permission to enter into such an agreement; and, secondly, it was not inrolled among the records of the court. It may also be observed, that this mode of levying a fine without an original writ, agrees exactly with the *transactio* of the civil law, which was not always an accommodation of a suit actually commenced, but an agreement relating to some doubtful matter, which must otherwise have become the subject of litigation. *Objectum sive materia transactionis sunt res dubiæ vel litigiosæ, de quibus scilicet vel nunc lis fit, vel in futurum esse possit, aut mutuatur, nam litem motam esse nihil necesse est.*

Brañ. 413 b.

§ 5. The observation of the judges in the abbot of *Merton's* case, may also be accounted for on another principle. An original writ was not absolutely necessary in *Brañton's* time to the commencement of a suit, for, if the defendant would appear in court without a writ, the judges might proceed in the suit, *tot erunt formulæ brevium quot sunt genera actionum, quia non potest quis sine brevi agere, cum non teneatur alius sine brevi respondere nisi gratis voluerit, et ex hoc ei non injuriatur, cum scienti et volenti non fit injuria.*

The law was, however, soon altered in this respect, for, when *Flota* wrote, an original writ was become absolutely necessary:—thus, in speaking of the court of Common Pleas, he says, *Habet etiam curiam suam et iudicarios suos residentes qui omnes recordum habent in eadem et coram eis fuerunt placitata, et qui potestatem habent de omnibus placitis et actionibus realibus et personaliibus et mixtis, dum tamen warrantum per breve regis habuerint cognoscendi, nam sine warranto jurisdictionem non habent neque collectionem.* Lib. 2. c. 34.

§ 6. It seems, however, to have been very soon established, that no fine could be levied, unless upon a *placitum* or suit actually commenced in the usual manner; for *Glanville* describes a fine to be an accommodation of a suit actually commenced. *Contingit autem multoties loquelas motas in curia domini regis per amicabilem compositionem et finalem concordiam terminari, sed ex consensu et licentia domini regis, vel ejus justiciariorum, undecunque fuerit placitum, sive de terra, sive de alia re.* It even appears, that so early as the reign of *Hen. 3.*, there was a particular *placitum* adapted to the purpose of levying a fine; thus *Madox* has transcribed a fine levied in the 27 *Hen. 3.* between *Ranulph*, abbot of *Ramsay*, and *Matthew de Layham*. *Unde placitum finis facti summonitum fuit inter eos in eadem curia.* Glan. l. 8. c. 1. Dissert. f. 17.

§ 7. The modern manner of levying fines was settled by the statute *De Modo Levandi Fines*, 18 Ed. 1. sta. 4., by which it was enacted, that no fine should thenceforth be levied, unless upon a suit actually commenced in the usual way. So that a fine then became an

Modern Manner of levying Fines.
2 Inst. § 10.

an accommodation of a suit in the most strict and technical sense : and, since the passing of that act, no material alteration has been made in the manner of levying fines.

5 Rep. 38 b.

§ 8. A fine now consists of five parts. The Original Writ. 2d, The *Licentia Concordandi*. 3d, The Concord. 4th, The Note ; and, 5th, The Foot, Chirograph or Indenture.

Original
Writ.

5 Rep. 38 b.

§ 9. When the parties have agreed to levy a fine, the person to whom the land is to be conveyed, commences an action or suit at law against the vendor, by suing out a writ of covenant against him, the foundation of which is a supposed agreement or covenant that the vendor shall convey the lands to the purchaser ; on the breach of which agreement the action is brought.

As no suit can be commenced in any of the courts of common law without an original writ, and as a fine is a friendly composition of a suit actually commenced, it follows, that no fine can be levied without an original writ ; and the statute *de modo levandi fines* expressly says, “ that the order of the common law will “ not suffer a fine to be levied in the king’s court “ without an original.” However, if the judges permit a fine to be levied without an original writ, it is not absolutely void, but only voidable.

Co. Read. 10.
2 Inst. 513.

5 Rep. 39 a.
Salk. 340.
Rep. Temp.
Holt 322.
Shep. Tou. 4.

§ 10. A fine may be levied on every writ by which lands may be demanded, charged, or bound ; or which in any sort concerns land. Such as a writ of mesne, *warrantia*

warrantia chartæ, de consuetudinibus et servitiis, &c.
But a fine cannot be levied on an original in a personal action. A fine may also be levied of an advowson in a writ of right of advowson, of which, *Madox* has given an instance of great antiquity.

Mad. Dis.
f. 15.

§ 11. The writ on which fines are now usually levied, is a writ of covenant, which is in the realty, and lies where a man covenants to levy a fine to some other person of his lands and tenements. The form of the writ is thus:—*Præcipit A. quod teneat B. conventionem inter eos factam de manerio, &c. et nisi &c.*

Booth 242.

Reg. Brev.
165 a. Fitz.
N. B. 146.

§ 12. There must be fifteen days between the *teste* and the return of this writ, and the *teste* must not be on a *Sunday*, or any day that is not *dies juridicus*.

§ 13. In suing out a writ of covenant, there is a fine due to the king called the *primer-fine*; for in every real action for lands and tenements, of the yearly value of five marks, there is a fine of 6 s. 8 d. due upon the original in the Hanaper Office.

2 Inst. 511.

§ 14. Where the sheriff of the county in which the lands lie, is a party to the fine, the writ ought to be directed to the coroner: for, although the sheriff is in general the proper officer to execute all writs, yet where the writ is brought against himself, it is the practice, in order to prevent partiality, to direct the writ to the coroner with this clause, *Quia prædictus A. B. est vicecomes comitatus D. fiat executio brevis præ-*

Done v. Sme-
thier & Leigh,
Cro. Car.
416. W. Jones
373.

dict.

diff. per coronatorem, ita quod vicecomes non se intro-
mittat.

o. Read. 10.

bro. Ab. Tit.
sec. 82.

§ 15. If an original writ be countermanded by a *retraxit*, a fine cannot afterwards be levied on it. Thus, in an Affise, the plaintiff appeared and made a *retraxit*; afterwards, the judges recorded an agreement between the parties in the nature of a fine: and by the better opinion it was void, *et coram non judice*, because when the agreement was made, there was no suit depending, the writ being determined by the *retraxit*.

§ 16. Formerly, if the king had died after the purchase of the original writ, the parties could not proceed to levy a fine on it, because it was abated. But now it is otherwise; for by the statute 1 Ann, c. 8. f. 5. no original writ, process, or proceedings whatsoever, shall abate by the death of any king or queen.

§ 17. As the parties are not supposed to appear before the return day of the writ of covenant, it follows, that no agreement can take place between them until that period: and, therefore, if any of the parties die before the return day of the writ of covenant, the fine will be void.

Wright & M.
of Wickham,
Cro. Eliz.
468.

§ 18. A writ of error was brought to reverse a fine levied by husband and wife, and the error assigned was, that the writ of covenant upon which the fine was levied, bore *teste* the 10th of August 12 Eliz., and was

was returnable in *Michaelmas* term of the same year, which was the 27th of *October*. The fine was acknowledged before commissioners, and the wife died the 17th of *October*, which was before the return of the ~~writ~~ covenant. The fine was reversed.

Value point was determined in the cases of *Price v. Davies*, Comb. 57—71. *Clements v. Langharne*, 2 Lord Raym. 872. *Watts v. Birkett*, Barnes 220. *Wilf. Rep. p. 2. 114. 115.*

§ 19. The second part of a fine is the *licentia concordandi*, for as soon as the action is brought, the defendant knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them, but having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up, which is readily granted on payment of another fine.

Licentia Concordandi.
5 Rep. 39 2.

§ 20. This fine is called the King's silver, and is paid on obtaining the *licentia concordandi*, because the King by such composition loses the fines, amerciaments, and other advantages, that would have accrued to him upon the judgment or nonsuit, which in ancient times formed no inconsiderable part of the royal revenue.

King's Silver.
2 Inst. 511.

§ 21. The King's silver, which is sometimes called the post-fine, with respect to the primer-fine, due on the original writ, is an ancient revenue of the crown,

Idem.

and is as much as the primer-fine, and half as much more. It is entered on the writ of covenant in the following manner:—*Robertus Drury dat Domine Regine sept. lib. pro licentia concordandi cum Thoma Tey arm. et Eleonora uxore ejus de placito conventionis de maneriis de, &c. &c. et habet chirographum per pacem admissum coram Jacobo Dier, &c.* Such entry ought to contain, 1st, The sum given for licence to compound. 2d, The party who pays it, that is, the person in whom the fee is to be vested. 3d, The plea, and between whom: 4th, The land for which the fine is paid.

§ 22. If any of the parties die before the entry of the King's filver, the fine is in general void; because the King's filver not being due until the return of the writ of covenant, and being paid for permission to accommodate the suit, the agreement of the parties cannot be considered as lawful until it is entered; and consequently if the demandant or tenant dies before this is done, the fine will have no effect, being similar to a judgment given in an adversary suit, after the death of one of the litigating parties. If however it should appear upon record that the King's filver was paid before the death of the cognizor, though in truth the fact be otherwise, the judges will support such a fine, and will not allow of any averment that the cognizor died before the entry of the King's filver, because that would contradict the record.

Vide infra.

Farmer's
Case,
Hob. 330.
Dyer 220 b.

§ 23. A man and his wife acknowledged a fine before commissioners, the 26th of March 1621, and the

the wife died on the 27th of the same month. The 28th, composition was made in the alienation office upon a writ of covenant, made returnable in *Hilary* term before, and the King's silver was entered in the office of the King's silver as of the same *Hilary* term, and the fine was passed and engrossed. The heir at law of the wife moved in the *Easter* term following against this fine, but upon debate the court resolved that the fine must stand.

§ 24. A fine was acknowledged by a man and his wife on the 27th of *December* 1689, but by reason of King *James's* abdication, and his carrying away the great seal, there followed a stay of proceedings at law, and the woman died on the 22d of *February*. The King's silver was paid as upon a writ of covenant in King *James's* time, though no writ was then sued out. Afterwards a writ of covenant was purchased, returnable in *Michaelmas* term preceding, sealed with the seal of King *William* and Queen *Mary*, and the fine was engrossed as of *Michaelmas* term. It was moved that this fine should be vacated; but the court, after the cause had been twice argued, gave their opinion *seriatim* that the fine should stand, as the entering of the King's silver after the death of the parties could not then be examined into, the fine being engrossed and completed as a fine of *Michaelmas* term.

Anon.
2 Vent. 47.

Ball v. Cock,
3 Mod. 140.

§ 25. A fine was acknowledged before commissioners on the 13th of *May* 1754. The writ of covenant was tested the first day of *Easter* term in five weeks (19th *May*). It was compounded, and the

Barber v.
Nunn,
Barnes 218.

pre-fine paid between the 17th and 20th of *May*, and after passing the return, warrant of attorney, and *custos brevium* office, was brought to the King's silver office on the 11th of *June*, and the clerk then entered the King's silver or post-fine, in his book, and on the writ of covenant. *Mary Nunn* the cognizor, died on the 27th of *May*. A caveat to prevent the completing of this fine was brought to the King's silver office the 13th of *June*, before the record was made up in form, on behalf of *John Nunn*, eldest son and heir of the cognizor. A rule to show cause why that caveat should not be withdrawn, was made absolute, and the court utterly exploded the notion which prevailed, undoubtedly by mistake, in the case of *Harneis v. Mickletwaite*, that the King's silver was the pre-fine, or fine for licence to alienate, whereas the King's silver is the post-fine, or fine given *pro licentia concordandi*. The return of the writ of covenant was agreed to have been in the life-time of *Mary Nunn*, the cognizor; and from that time the crown had a right to the post-fine, which was entered at the King's silver office before any caveat was entered against it. The making up the record in form is a ministerial act, not necessary to be done previous to the caveat, as the entry of the clerk of the King's silver was sufficient.

Barnes 214.

Cotton v.
Tyrrell,
Barnes 215.

§ 26. When a year and a day has elapsed from the date of the caption, or acknowledgment of a fine, without entering the King's silver, an affidavit must be made that all those who depart with any interest by the fine are still living, otherwise the King's silver will not be received. And now that the King's silver is

paid at the Alienation Office, if a year elapses before the fine is carried to the King's silver office, an affidavit must be made that the parties were alive when the King's silver was paid.

Gregory v.
Croucher,
Barnes 215.

§ 26. A rule of the Court of Common Pleas, made in the term 9 *Ann.*, it is ordered, "That no fine whatsoever taken and acknowledged before the chief justice, or any judge of assize, or serjeant at law, if the date of the payment of such fine shall appear to have been made, shall for the future pass the Queen's silver office, and the Queen's silver of such fine be recorded, by the said clerk of the Queen's silver, before there be an order under the hand of the said chief justice, or some other justice of this court, for his passing and entering such fine first had and obtained."

§ 28. Formerly the post-fine or King's silver was paid at the King's silver office; but by the statute 32 *Geo. 2. c. 14.* it is enacted, *f. 1.* "That on every writ of covenant which shall be sued out for passing of fines in the Common Pleas at *Westminster*, the officer whose duty it is to set and indorse the pre-fine payable thereon, shall, at the same time, set the usual post-fine, and indorse the same on the back of the said writ, together with his name or mark of office, in like manner as the same are now indorsed at the King's silver office; which post-fine shall be forthwith paid to the receiver of the pre-fines at the Alienation Office, with 4*d.* as his fee for receiving the same, instead of his fee of 4*d.*

“ charged on lands and hereditaments, and payable
 “ to sheriffs, bailiffs, and others, on discharging the
 “ same, by 3 *Geo. I. c. 15.* which fee of 4*d.* by the
 “ said act granted, after the first day of *Trinity* term
 “ 1759, shall cease; and such receiver shall indorse
 “ upon the back of every such writ of covenant one
 “ mark of office, as is now used by him on the re-
 “ ceipt of pre-fines at the Alienation Office, with the
 “ name of such receiver, and the sum received as the
 “ post-fine, which mark of office each receiver shall dis-
 “ charge the manors, lands, and hereditaments com-
 “ prised in the said writ of covenant, and the cog-
 “ nizees named therein.”

Sect. 2. “ The officer or clerk of the King’s silver
 “ office, or his deputy, shall continue to enter every
 “ fine upon record, in the way hitherto used, and
 “ make the same entries, and put thereon the same
 “ indorsements, with the same mark, and in like
 “ manner as hath hitherto been the practice of the
 “ said office in passing fines; and no fine, until the
 “ same be marked with the sum to which the post-fine
 “ amounts in the King’s silver office, shall be effectual
 “ in law.”

Sect. 3. “ Where no pre-fine is payable on any writ
 “ of covenant, *viz.* where the lands are under the
 “ yearly value of five marks, the officer at the Alie-
 “ nation Office, whose duty it is to set pre-fines, shall
 “ set on every writ of covenant brought to the said
 “ Alienation Office, on which no pre-fine is payable,
 “ a post-fine of 6*s.* 8*d.* and shall indorse such post-
 “ fine

“ fine of 6 s. 8 d. on every such writ of covenant,
 “ with his name and mark of office, as it has been
 “ usual; and every such post-fine of 6 s. 8 d. shall be
 “ paid to the receiver of the Alienation Office before
 “ the writ of covenant, on which no pre-fine is pay-
 “ ed, is passed at the Alienation Office; and the
 “ receiver on payment of the said 6 s. 8 d. shall in-
 “ dorse and mark every such writ of covenant, as
 “ other writs of covenant are by this act directed to
 “ be indorsed.”

Sect. 4. “ The officer or clerk of the King’s silver
 “ office, or his deputy, after the first day of *Trinity*
 “ term 1759, shall not receive any writ of covenant,
 “ unless it appear by the mark and indorsement of
 “ such receiver, that the post-fine has been paid.”

Sect. 5. “ If after the payment of such post-fine,
 “ the writ of covenant, by the death of any of the
 “ parties, or other cause, be prevented from passing
 “ through the several other offices, so as the said fine
 “ is not completed, then the said receiver shall repay
 “ to the cognizees, or their attorney, on producing
 “ and filing with him the said writ of covenant, every
 “ such sum as has been by him before received for
 “ the post-fine; and such writ of covenant so remain-
 “ ing filed with such receiver, shall be a discharge to
 “ such receiver.”

§ 29. The third part of a fine is the concord, or
 agreement entered into openly in the Court of Com-
 mon Pleas, or before the Chief Justice of that court,

Concord.
 5 Rep. 39 a.
 Vide ch. 4.

or commissioners duly authorized for that purpose, which is the foundation and substance of the fine. It is usually an acknowledgment from the *deforciant*, or those who keep the others out of possession, that the lands in question are the right of the *demandant*; and from the acknowledgment or recognition thus made, the party who levies the fine is called the *cognizor*, and the person to whom it is levied the *cognizee*.

The form of the concord is [redacted] And the agreement is such, to wit, that the aforesaid *A.* (the *deforciant* in the original writ) hath acknowledged the aforesaid manors, lands, tenements, and hereditaments, with the appurtenances, to be the right of him the said *B.* (the plaintiff or demandant) and those he hath remised and quit-claimed from him the said *A.* and his heirs, to the aforesaid *B.* and his heirs for ever. And moreover the said *A.* hath granted for himself and his heirs, that he will warrant to the aforesaid *B.* and his heirs the aforesaid manor, lands, tenements, and hereditaments, with the appurtenances, against him the said *A.* and his heirs for ever."

§ 30. By the common law, the cognizor seems to have been bound to warrant the lands to the cognizee, although no express words to that purpose were inserted in the fine. *Item sufficit finis factus in curia Domini Regis, licet expressa warrantia vel homagium et servitium non intervenerit, dum tamen constiterit per finem*

finem & chirographum, quod illi qui tenet, tenere debeat de eo qui vocatur ad warrantum. But in course of time it became the practice to annex an express warranty to all fines, which is still continued.

formerly the practice for the cognizor to ~~take~~ cognizance (that is) to acknowledge the concord of the fine, before any original writ had been sued out, and this custom so far prevailed, that the judges uniformly ~~supported~~ such fines; but in all cases of this kind ~~the~~ original writ must have been sued out and made ~~returnable~~ returnable on some day previous to that on which the concord was acknowledged; a *licentia concordandi* must also have been obtained, and the King's silver must have been regularly paid and entered; for these circumstances were absolutely necessary to complete the fine.

Farmer's
Case,
Hob. 330.

§ 32. The practice of acknowledging the concord of a fine before the writ of covenant was sued out, was often productive of great inconveniencies and irregularities, which are now prevented by a rule of the Court of Common Pleas, made in *Trinity* term 30 Geo. 3. by which it is ordered that, from and after the first day of *Michaelmas* term then next ensuing, every fine at the time of signing the judge's *allocatur* thereon shall have the writ of covenant sued out and annexed thereto.

1 Hen. Black.
Rep. 526.

§ 33. By the statute 23 *Eliz.* c. 3. f. 5. it is enacted,
“ That every person that shall take the knowledge of
“ any

Title XXXV. *Fine.* Ch. ii. § 33—36.

“ any fine, or shall certify them, shall, with the certificate of the concord, certify also the day and year wherein the same was knowledged. And that no clerk or officer shall receive any writ of covenant, whereupon any fine is to pass, unless the day of the knowledge of the same fine be heard in, or by such certificate, upon pain that every clerk that shall receive any such writ shall forfeit for every time that he shall so offend the sum of five pounds.”

§ 34. The concord of the fine comes in lieu of the sentence which would have been given in case the parties had not compounded the cause; and is therefore exactly of a similar nature, and attended with the same consequences as a judgment in an adversary suit. The cognizance must therefore be made of those things only, and to those persons only who are named in the original writ on which the fine is levied, because the cognizance being in the nature of a judgment binds only those persons and things which are judicially before the court.

Co. Read. 6.

Co. Read. 6.

§ 35. This rule however admits of a few exceptions, for a remainder may be limited in the concord of a fine, to a person not named in the original writ, in the same manner as a remainder may be limited in a deed to a person who is not a party to it.

Co. Read. 11.

§ 36. If a *praecipe* be brought against a tenant for life, and upon his default the person in reversion is received,

received, he may levy a fine of his reversion to the demandant, although he is not named in the original writ. In the same manner if a fine is levied by a vouchee to the demandant, or by a demandant to the vouchee, will be good; but a fine levied by a vouchee to a stranger is void. 3 Rep. 29 b.

The reason of the two last cases is, because the person in reversion and the vouchee, are allowed by the court, to take the place of the tenant against whom the *process* was originally brought; and, having thus been made parties to the suit, they are bound by the judgment, as much as if they had been named in the original writ.

§ 37. The object of fines being to settle the possession, not only for the present but for ever, in the most certain and secure manner, the judges never allow lands to be limited in the concord of a fine to two persons and their heirs, but always direct the lands to be limited to the two persons, and to the heirs of one of them.

Bro. Ab. Tit.
Fine 7.
5 Rep 38 b.
Co. Read. 8.

§ 38. The necessity of the case, however, requires that where the lands comprehended in the fine are held by gavelkind tenure, this rule should be dispensed with; and therefore when a fine was levied of lands held in gavelkind, the judges will permit them to be limited to two or more persons and their heirs.

Robinson's
Gavelk. 137.

Co. Read. 3.
Rob. Gav.
132.
Bro. Ab. Tit.
Fine 65.

§ 39. A warranty ought not to be allowed in the concord of a fine from two persons and their heirs for the same reason; but a warranty has been allowed from three persons and their heirs where the estate was held in gavelkind.

2 [redacted] 1.

§ 40. The judges ought not to permit a [redacted] be levied upon condition, nor should a saving or exception, or a clause of re-entry be allowed in a fine. But let it be observed that if a fine is [redacted] to two persons and their heirs, or with [redacted] from two persons and their heirs, or upon [redacted] with a saving, exception, or clause of re-entry, such a fine will notwithstanding be valid, upon the principle that *fieri non debuit sed factum valet, et facta tenent multa quae fieri prohibentur*. And Plowden has given some instances of fines levied on condition, which were allowed to be good.

12 Rep. 125.
Plowd. 34.

2 Inst. 512.
Dyer 227.

§ 41. Lands situated in different counties may be contained in the same concord, but there must be several writs of covenant.

Wilfon 47.

§ 42. Formerly lands purchased of different persons were allowed to be comprised in the same concord, and every vendor warranted against himself and his heirs only. But by an order of the Lord Chancellor *Hatton*, reciting, that by these kinds of fines her majesty was defrauded of the profits of her post-fines, and of the seals on writs, and the Chancellor and other officers lost their fees, the cursitors are authorized

thorised to stay a writ where there is more than one demandant, and one deforciant, except coparceners, joint-tenants, and tenants in common. But the curators will permit two separate purchases to be comprised in one fine, on an affidavit that the value of the land does not exceed two hundred pounds.

§ 43. The *concordia facto in curia* is the complete fine, and therefore if after the concord is acknowledged in court a cognizor dies, still the cognizee may sue for his fine against the surviving cognizor.

§ 44. Where two brothers acknowledged the concord of a fine before Lord Chief Justice *Hobart*, and then the elder brother died, several motions were made for the proceeding and staying of the fine; but the Chief Justice was clearly of opinion, that the cognizee might proceed with his fine as against the surviving brother, and take out his writ of covenant accordingly; the death of his elder brother being no impediment, for the acknowledgment of each person was good against himself, and should operate for as much as he could pass.

Ersfield's
Case,
Hob. 329.

§ 45. A fine was stopped at the King's silver office for want of an affidavit that the parties were living, a year having elapsed since the acknowledgment; and one of the cognizors being dead, application was made to the judges that he might be struck out, and that the fine might pass as to the other cognizor. This motion was denied, but a rule was made that the surviving

Cotton v.
Baylie,
Barnes 215

surviving cognizor shew cause why the fine should not pass generally as to all the parties; and upon affidavit of service, the rule was made absolute.

Note.

§ 46. The fourth part of a fine is the *note*, which is an abstract of the writ of covenant, and concord; and is only a docket taken by the chirographer, from which he forms the chirograph. It is sometimes taken in the old books for the concord.

Foot or Chirograph.

§ 47. The fifth and last part of a fine is the foot, chirograph, or indenture, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made or ingrossed at the chirographer's office, and delivered to the cognizor and cognizee, beginning with these words—*Hæc est finalis concordia*, and then reciting the whole proceeding at length; thus the fine is completely levied at common law.

Co. Read. 1.

§ 48. A fine is said to be ingrossed when the chirographer makes out the indentures, and delivers them to the parties. But it is not absolutely necessary that a fine should be ingrossed, provided it be recorded; for Lord *Coke* observes, that a fine is a perfect record before it is ingrossed.

§ 49. A fine may be ingrossed at any time after it is levied.

Sir *John Brome*, in 33 *Hen.* 8. acknowledged a fine of certain lands. The King's silver was entered, and the cognizance taken ; and in 29 *Eliz.* the person who claimed under this fine came into court, and prayed that the fine might be engrossed, it appearing upon examination, that the party to whom the fine was levied, was seized after the fine, and suffered a common recovery of the land, which had been enjoyed according to the said fine ever since. The court ordered the fine to be engrossed.

Sir J. Brome's
Case,
4 Leon. 96.
Dyer 254 a.

§ 50. The record of the fine which remains in the possession of the chirographer is the *principale recordum* ; so that if there is any difference between it and the record which remains with the *custos brevium*, that which continues with the chirographer is considered as the true record.

3 Leon. 183.
Case 234.
Godb. 103.

§ 51. The chirograph of a fine is evidence to all persons, and in all courts, of such fine ; because the chirographer being an officer appointed by the law for the purpose of transcribing fines from the record, his copies must be allowed to be authentic.

Gillb. Evid. 24.
Buller N. P.
229.

§ 52. There are two petitions of the Commons in the rolls of Parliament, 4 *Hen.* 4. N° 35. and 5 *Hen.* 4. N° 28. stating, that many fines of land remained in the King's treasury, and the notes of such fines remaining in the Court of Common Pleas, had been taken away, and other fines and notes of fines counterfeited and put in their places, whereby many persons were disinherited ; in consequence of which, a

All the Pro-
ceedings on
Fines must be
recorded.
Rot. Parl.
Vol. 3. 495.
543. 557.
558.

statute was immediately passed, 5 *Hen. 4. c. 14.* enacting, that all the proceedings on fines, both previous to and at the acknowledgment thereof, should be inrolled of record in the Court of Common Pleas. And by the 23 *Eliz. c. 3. § 1. & 6.* it is enacted, that every writ of covenant and other writ upon any fine shall be levied, the return thereon, the writ of *dedimus potestatem* made for the knowledging of any of the same fines, the return thereof, the concord, note and foot of every such writ, and the proclamations made thereupon, and the King's silver, may, upon the request or election of any person, be inrolled in rolls of parchment; and that the inrolments of the same, or of any part thereof, shall be of as good force and validity in law, to all intents, respects, and purposes, for so much of any of them so inrolled, as the same, being extant and remaining, were or ought by law to be.

§ 53. The office of the chirographer of fines was burnt down in the year 1679, whereby several records of fines which had been levied in *Trinity* and *Michaelmas* term preceding, were either burnt or lost. In consequence of which an act was passed, 31 *Car. 2. c. 3.* reciting, that the fines so burnt or lost had duly passed all the offices; so that by the records of the King's silver, the notes of the curfitor who made out the writs of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy, &c. the full contents of all such fines would appear. But for want of the records of the fines so burnt or lost, purchasers
and

and others, whose titles were secured under the said fines, were in danger of having the same impeached. It was therefore enacted, that the said chirographer or his deputy should, before the end of the next *Trinity* term, do oath certify to the Justices of the Common Pleas of all such fines entered into the said books by the said deputy, that he, upon diligent search should find, were either burnt or lost, by reason of the said fire; which certificate should be in parchment, fairly written, and a copy thereof set up in *Westminster-Hall*; & that at any time within three years, the Chief Justice of the said Court of Common Pleas, together with any one or more of the Justices of the said court, should have power to send for any officer's books, records, &c. and upon full examination of any such fine, the records whereof were burnt or lost, should direct the said chirographer or his deputy to new-engross the note and foot of such fine without fee, and to carry the same before the said Chief Justice, and such other of the said justices as shall have taken the examination concerning the burning or loss of such fine, who are required to subscribe their names at the bottom of the said note and foot; and every such fine whereof the record should be so new-engrossed, should be of the same force and effect, as if it had still remained upon record unconsumed or not lost.

§ 54. It is a principle of the common law, that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question; so that no averment can be made against any fact which is once upon record; and, therefore, when

No Averment against the Chirograph.
2 Inst. 260 a.
Dyer 89 b.

the foot, or *chirographum* of a fine is recorded, no averment can be made as to the caption or time of its acknowledgment, but it must be considered as a fine of that term in which it is recorded.

Lloyd v. Vif.
Say v. Sele,
179.

§ 55. Upon a trial at bar, in ejectment, that *Nathaniel* Lord Viscount *Say* and *Sele* tenant in tail of the premises in question, with remainder over, levied a fine in *October* 1701, and, in *Michaelmas* term following, suffered a recovery: and to prove this, the *chirograph* of the fine was produced, importing, that *Nathaniel* Viscount *Say* and *Sele* levied that fine on the 23d of *October* 1701; and the exemplification of a common recovery was also produced, which appeared to have been suffered on the 18th of *November* 1701. The question was, whether the cognizee of the fine had the freehold in him when the recovery was suffered?

It was insisted by the plaintiff's counsel that he had not; for that the fine given in evidence to make him so, was not in fact acknowledged, until the 2d of *March* 1701, which was four months after the recovery was suffered; and, to support this fact, they offered to produce and prove, 1st, The record of the recognizance, or acknowledgment of the fine, under the hand of the Lord Chief Justice *Trevor*, whereby it appeared, that the acknowledgment thereof was made and taken before the said Lord Chief Justice on the 2d day of *March* 1701, and not before. 2dly, That the acknowledgment of the fine was the very true acknowledgment or recognizance of the concord.

upon which the fine given in evidence passed, and upon which the *chirograph* of that fine was made and engrossed. And, 3dly, They offered to produce the files of the Court of Common Pleas of the acknowledgment made in *Michaelmas* term 1701, whereby it was shown that Lord *Say* and *Sele* did not acknowledge the fine whatsoever, of or in that term at any time before the suffering the common recovery. But the Court of Queen's Bench refused to admit any of the matters offered against the fine to be given in evidence, being of opinion, that no proof or evidence of the time of the acknowledgment of a fine ought to be admitted, contrary to, or against the *chirograph* thereof; and that the record, which is the *chirograph* of the fine, cannot be falsified until it is vacated or reversed.

From this judgment, a writ of error was brought in the House of Lords; and one of the errors assigned was, because the records and matters offered to be given in evidence, were not admitted or allowed by the court to be given in evidence to prove the true time of acknowledging the fine. In support of which, it was insisted, that as the fine was not in fact acknowledged until the 2d of *March*, it could not transfer the freehold of the lands to the tenant to the *præcipe* three months before the time of that acknowledgment; and that the plaintiff was admitted to the proof of this fact, by the statute 23 *Eliz. c. 3. f. 5.*, which directs, that the time of the acknowledgment shall be certified by those who take such acknowledgment; for, if a man cannot give in evidence the time of acknowledging a

D 2

fine,

fine, in order to avoid deceit imposed upon him by that fine, this statute would answer no purpose.

On the other side, it was contended, that the caption of the fine ought not to be admitted to the record or indenture of the fine; for it would destroy all family settlements, and introduce the greatest uncertainty and confusion in all conveyances by fines, upon which the most considerable estates in the kingdom depended; and that an attempt to set aside a fine upon evidence was never before made. That, in the indentures of all fines, the concord is recorded to be made in court; whereas the captions of the acknowledgments of all fines (except a very few) are taken out of court, either before the Lord Chief Justice of the Common Pleas, or commissioners in the country; and upon a writ of error, no error can be assigned in the caption varying from the record, as that would be an error contrary to the record: but if, in the present case, the fine was irregular, the proper method was to apply to the Court of Common Pleas where the same was levied, and not attempt, in a summary way, to invalidate it by evidence in ejectment. The judgment was affirmed.

Vide infra.
ch. 14.

Of Motions
to prevent
Fines from
being completed.

§ 56. Applications are sometimes made to the Court of Common Pleas to prevent fines from being completed, on a suggestion, that the parties are disabled by law from levying such fines.

Willon 96.

By a rule of court made *Hil.* 28. and 29 *Car.* 2., all persons making any complaint against fines acknowledged

ledged by infants, feme-coverts, without the consent of their husbands, or persons of *non sane memorie*, or otherwise disabled by law to acknowledge the same, or by any person in the name of another, or by the like doing, obtaining rules for the staying of such fines from term to term, so long as they shall extend to the observance of such rules, enter and continue the same rule for that term, or leave copies thereof with the custos brevium, clerk of the king's silver, and chirographer, that the same may thereby be the better taken notice of; or, in default thereof, the said officers, or any of them, shall not stand farther obliged thereby.

And all persons concerned in the obtaining or prosecuting such rules for the staying of such fines so levied as aforesaid, their attornies and clerks, are thereby enjoined every term, to search and see the books and entries of fines with the clerk of the king's silver, or other officer, where entries are kept for that purpose.

§ 57. By a rule of court made *Pasch. 29 Car. 2.*, all manner of *caveats* and orders for the stopping any fines shall be renewed every term, and copies thereof left with the clerk of the king's silver, for which he is to demand only his antient fee of 3 s. 4 d. the term; and in default thereof, all *caveats* that shall not be so renewed, shall lose their force and be void.

§ 58. When fines became a general mode of assurance, it became necessary to render the levying of them a matter of the most public notoriety, on account of those whose

Of the Proclamations.

rights might be barred by not making their claim in due time. For this purpose, it was enacted by the 27 *Edw. 1. c. 1.*, that the notes of all fines should, in future, be openly read in the Court of Common Pleas at two certain days in one week, ~~and that~~ during such reading, all pleas should cease.

§ 59. By the statute 4 *Hen. 7. c. 24. f. 1. n.* enacted, “ That after engrossing of every fine, it shall be
 “ read and proclaimed in open court the same term,
 “ and in three terms then next following the same engrossing, in the same court, at four several days in
 “ each term. And, in the same time that it is so read,
 “ all pleas to cease.”

Since the making of this act, the proclamations are indorsed on the foot of the fine, and are considered as matters of record.

Plowd. 371.

§ 60. By the words of the statute 4 *Hen. 7.*, if one of the three terms immediately subsequent to that in which a fine was levied, was adjourned, the proclamations would have been ineffectual, and this defect could not have been supplied in the next term; to remedy which, a statute was passed 1 *Mary. c. 7. f. 2.* enacting, “ That all fines, whereupon the proclamations
 “ should not, by reason of the adjournment of any
 “ term by writ, be duly made, should be of as good
 “ force, effect, and strength, to all intents and purposes, as if the term had not been adjourned.”

It has been determined by all the judges, that even an adjournment of part of a term was provided for by this act, because it was a favourable law, and to be construed by equity.

Dyer 186 a.
2 Inst. 519.

§ 61. Eliz. c. 2. it is enacted, that all fines shall be proclaimed only four times, that is to say, once in the term wherein they are engrossed, and once in every of the three terms holden next after the same engrossing; and that every fine proclaimed as aforesaid, shall be of as great force and effect in law, to all intents and purposes, as if the same had been fifteen times proclaimed.

§ 62. Since the statute of 4 Hen. 7. fines have been distinguished into fines at common law, and fines with proclamations: it is in the election of every person who levies a fine, to have it proclaimed in the usual manner, or not. And if the cognizee dies before the proclamations are made, his heirs may cause the fine to be proclaimed.

3 Rep. 86 b.
Wakefield v.
Hodgson,
Cro. Eliz.
692.

§ 63. The statute directs, that the proclamations should be made not only during term, but also in court, at the time when the judges are sitting: so that, if the proclamations happen to be made either before the beginning or after the end of term, or on a Sunday or other festival day on which the court does not sit, being *dies non juridicus*, the proclamations will be all void. And, although the proclamations should be made on days which were *dies juridici*, yet, if the con-

Fish v.
Brocket,
Plowd. 265
Dyer 181 b.

trary appears on record, the proclamations are void, as no averment can be admitted against the record.

Dyer 216 a.
1 Bullst. 206.

§ 64. An error in the proclamations would not, however, destroy the validity of the fine; but the fine, taken separately, is one perfect matter of record, and the proclamations are made, which binds the parties and the right of the land, and the proclamations are distinct and different from the fine, they and the fine being several matters of record; for which reason, error in the one is not error in the other. But if the fine is erroneous, the proclamations are then void, because the fine is the principal, and *sublato subjecto tollitur ejus accedens*.

Ragg and
Bowley's
Case, 3 Leo.
106.

§ 65. If the proclamations on a fine be certified in a *certiorari* by the *custos brevium*, and it appears by the certificate that two of the proclamations were made in one day, a new *certiorari* may be directed to the chirographer, and if he certifies that the proclamations were well and duly made, the court will direct the proclamations in the office of the *custos brevium* to be amended according to the proclamations in the chirographer's office, because the chirographer makes the proclamations, and is the principal officer as to them; and the *custos brevium* has only an abstract of them,

Gilb. Evid.
25 Buller N.
P. 229.

§ 66. When a fine with proclamations is given in evidence, the proclamations must be examined by the roll, because the chirographer is not appointed by the statute

statute to copy the proclamations, as he is to copy the concord.

§ 67. *23 Eliz. c. 3. f. 6.* it is enacted, that the clerk shall, every term, write out a table of fines levied in each county in that term, and lay the same in some open part of the Court of Common Pleas all the next term; and shall also deliver the contents of each table to the Sheriff of each county, who shall at the next assizes fix the same in some open part of the court.

§ 68. It was formerly a practice, for one person to acknowledge a fine in the name of another; and, in such cases, the Court of Star Chamber, within whose jurisdiction frauds of this kind were considered, could only punish the offender by imprisonment. But by the statute *21 Jac. 1. c. 26.* it is enacted, that all and every person and persons who shall acknowledge any fine in the name of any other person, not privy or consenting to the same, and shall be lawfully convicted thereof, shall suffer death without benefit of clergy.

Felony for one Person to acknowledge a Fine in the Name of another.

§ 69. With respect to the time when a fine is completed, Lord Coke, in his Comment on the Statute *De Modo Levandi Fines*, says, “ A fine is said to
“ be levied when the writ of covenant is returned,
“ and the concord and the king’s silver duly entered;
“ this maketh the land to pass; and from this shall
“ the year and day be accounted, albeit the fine be
“ engrossed afterwards.”

At what Time a Fine is completed.
2 Inst. 517.

Title XXXV. Fine. Ch. ii. § 69—72.

The modern method of levying a fine by first acknowledging the concord, then suing out an original writ, and paying the king's silver, has given rise to a different mode of expressing the rule laid down by Lord Coke; for a fine is now said to be completed upon the entry of the king's silver, (whether it was previously acknowledged); and if any of the parties die before the remaining parts of the fine are perfected, still the fine will be valid.

§ 70. This principle has so far prevailed, that the court will not prevent a fine from being completed after the king's silver is paid, if the parties are alive.

Petty's Case.
1 Freem. 78.

A motion was made to stay the passing of a fine, which was acknowledged by an infant of 13 years old; the court said, as the king's silver was paid, it was gone too far. But they assigned the infant a guardian, who had instructions to bring a writ of error to reverse it.

§ 71. In consequence of the rule of court already stated, by which it is directed, that the writ of covenant shall in future be sued out before the concord is acknowledged, it may now be laid down, that a fine is completed when the concord is duly acknowledged.

When a Fine
begins to
operate.

§ 72. Although it must be very material, in many instances, to fix the precise time when a fine begins to operate, yet it is a subject respecting which very little is to be found in the writers on law. But if we reason
by

by analogy from the nature and effects of other judgments, we shall be able to ascertain this point.

The time when a fine is acknowledged, is perfectly immaterial in this respect; for we have already seen [REDACTED] it was determined, that a fine be- Ante f. 55.
[REDACTED] Michaelmas term, although it was not
acknowledged until four months after.

§ 73. The term in law, is considered to many purposes as but one day; and if a judgment be given at any time during the term, it relates to the first day of that term, and is considered, in law, [REDACTED] having been given on that day; and the first day of term is the effoin day, for the *quarto die post* is only a day of grace. However, if a writ is returnable on the second or any other return-day of the term, the judgment will then relate to that return-day, for, until the return of the writ, the judgment cannot possibly be given. Cro.Car. 10

§ 74. A fine being considered as a judgment, must, like all other judgments, relate to the first day of term in which it is recorded, if the writ of covenant whereon it is levied be returnable the first day of term, otherwise it must relate to the return-day of the writ of covenant; for, in levying a fine, there is no continuance of process to retard the relation, as the *licentia concordandi* is supposed to be obtained on the return of the writ of covenant, and the concord immediately acknowledged.

§ 75. In support of this proposition, I shall transcribe a case reported by *Jenkins*, of which, I presume, the authority will not be disputed, although the reporter has not mentioned when, or by what court, it was determined,

“ *A.* covenants with *B.* to levy a fine *October* is
 “ 1 *Car.* *A.* acknowledges a statute to *C.* 8th *October*
 “ same year. The fine is levied according to the co-
 “ venant, and the conufance taken the 12th *October*
 “ aforesaid. This conufee fhall avoïd faïd statute by
 “ relation to the day of the effoin, which was before
 “ the faïd 8th day of *October*.”

Vol. 3. p. 170.

§ 76. In a note of *Mr. Peere Williams*, it is faïd, that if *A.* devises land and levies a fine, and the caption and deed of uſes are before the will, but the writ of covenant is returnable after the will, this ſeems a revocation; becauſe a fine operates as ſuch from the return of the writ of covenant, and not from the caption; and yet (ſays the reporter) this is a hard caſe, ſince by the caption the party conuſor does all his part, and the reſt is only the act of the clerk or his attorney, without any particular inſtructions from the party.

1 Burr. 711.

Theſe paſſages, and the concluſions drawn from the rules by which all other judgments are conſtrued, ſeem fully to prove, that a fine, whether it be acknowledged before or after the original writ on which it is levied is ſued out, will begin to operate from the return-day of ſuch original writ,

TITLE XXXV.

F I N E.

CHAP. III.

Of the several Sorts of Fines.

- | | |
|---|--|
| § 1. <i>Fines executed, and executory.</i>
9. <i>Fines sur Cognizance de Droit come ceo, &c.</i>
17. <i>Fines sur Cognizance de Droit tantum.</i> | § 21. <i>Fines sur Concessit.</i>
22. <i>Fines sur Done Grant and Render.</i> |
|---|--|

Section I.

WHENEVER a judgment is obtained, whether in an adversary or an amicable suit, the next step is, to procure the execution of it, by obtaining the actual possession of the thing recovered: and, for this purpose, the law has provided, that in all real actions, the person who recovers, shall have a writ of *habere facias seisinam*, directed to the sheriff of the county in which the lands are situated, commanding him to deliver the possession according to the judgment.

Fines executed and executory.

Fines having at all times been considered as judgments in adversary suits, a writ of *habere facias seisinam* always issued to put the party in possession who acquired the lands by a fine. When fines became common assurances, the purchaser, in order to avoid the trouble and expence of suing out a writ of possession, had, in some instances, livery of seisin given him in the country, and,

Ante f. 4.

and, for his further assurance, obliged the vendor to covenant that he would levy a fine to him; but as the purchaser was already in possession, no *habere facias seisinam* was deemed necessary.

Co. 2. § 2. This practice gave rise to the distinction between fines executed and fines executory. A fine executed immediately transferred the possession from the cognizor to the cognizee, who might therefore enter on the lands which had been conveyed to him by the fine, as soon as it was levied.

A fine executory did not, of its own force, give immediate possession in law to the cognizee, as he could not immediately enter on the lands; but it was necessary that he should sue out a writ of *habere facias seisinam*, in order to gain possession of that which he had acquired by the fine.

1 Inst. 320 a.
Shep. Tou.
253.

§ 3. The cognizee of a fine could not distrain before entry, because an avowry came in lieu of an action, to which privity was requisite; for the same reason, he could not have an action of waste, a writ of entry *ad communem legem in consimili casu*, or in *casu proviso*.

Gilb. Ten.
102.

But the cognizee might take those things which the lord might seize or enter upon, without bringing any action, as a heriot, lands fallen by escheat, or might enter for an alienation of a tenant for life.

2 Inst. 469.

§ 4. Where the cognizee of a fine executory had suffered a year and a day to elapse from the time when the fine was levied, without suing out a writ of *habere facias*

facias seisinam, he must then have sued out a writ of *seire facias*, which might also be sued out by the heir of the cognizee.

§ [redacted] writ, the sheriff was commanded to [redacted] tenants to appear and shew cause, if they [redacted] the cognizee of the fine, or his heirs, should not have execution of the fine. And if at the return of the *seire facias* the terre-tenants did not shew some cause to the contrary, the plaintiff or cognizee became entitled of course to a writ of *habere facias seisinam*.

§ 6. If the party to whom the estate was limited by a fine executory was in possession at the time when such a fine was levied, he need not have sued out a writ of *habere facias seisinam*; for, in that case, the fine would enure by way of extinguishment. Shep. Tou. 4.

§ 7. If a fine executory was levied of a reversion depending on an estate for life, or years, or of a feignory, or any thing which lay in grant, they would pass immediately, because it would be impossible to give actual possession of them. 1 Rep. 97 a.

§ 8. Since the statute of uses 27 Hen. 8. writs of possession are never sued out where fines are levied to uses, for the statute executing the possession to the use, the cognizee is immediately in possession without attornment; and by the 4th and 5th Ann, c. 16. attornment after a fine is become unnecessary, so that writs of possession are now totally disused. Booth 250.
Pigot 49.
6 Rep. 68 a.

2 Comm. 352.

Fines are again divided into four sorts; 1st, *Fines sur cognizance de droit come ceo*, &c. 2d, *Fines sur cognizance de droit tantum*. 3d, *Fines sur concessit*. 4th, *Fines sur done grant et render*.

Fines sur
Cognizance
de droit come

§ 9. A fine *sur cognizance de droit come ceo* *de son done* is the best and surest kind of fine, *de forciant*, in order to keep his supposed covenant with the plaintiff, of conveying him the lands in question, and at the same time to avoid the formality of an actual feoffment, with livery of seisin, acknowledges in court a former feoffment or gift in possession, to have been made by him to the plaintiff; so that it is rather an acknowledgment of a former conveyance than a conveyance originally made; for the deforciant acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he had *de sone done*, of the proper gift of himself, the cognizor.

1 Inst. 50 b.

1 Salk. 339.

3 Atk. 141.

§ 10. This species of fine has been called a feoffment of record; but this expression is by no means accurate; for there are cases in which a feoffment has a more extensive operation than a fine; and, therefore, Sir William Blackstone has justly observed, that it might, with more accuracy be called an acknowledgment of a feoffment on record.

§ 11. The form of this fine is; “ And the agree-
“ ment is such, to wit, that the aforesaid *A.* hath ac-
“ knowledged the aforesaid manor, &c. to be the right
“ of him the said *C.* as that which the said *C.* hath of
“ the gift of the aforesaid *A.*, and that he hath remised

Title XXXV. Fine. Ch. iii. § 11—15.

“ and quit-claimed from him the said *A.* and his heirs
“ to the aforefaid *C.* and his heirs for ever.”

§ 12. This species of fine is executed, and therefore Co. Read. 2. gives the cognizee immediate possession of the land.

§ 13. No man passes an estate in fee-simple without the assent of his heirs; for when the cognizor acknowledges the lands to be the right of the cognizee, it would be repugnant and contradictory to his own acknowledgment to claim any estate in the lands in remainder or reversion. Besides in every judgment a fee-simple was recovered, and the cognizance or acknowledgment of the concord coming in the place of a judgment, must have the same effect. 1 Inst.

§ 14. But if the concord is qualified by the express words of the parties, as if the lands are limited to the cognizee for life, or to the cognizee and the heirs of his body, the fine will then only pass an estate for life, or an estate in tail; for it would be absurd that a greater estate should pass than that which the parties themselves have limited; and the preceding donation or feoffment which is acknowledged in the fine, may as well be supposed to have been for life, or in tail, as in fee. 1 Salk. 340.

§ 15. A rent cannot be reserved on a fine *sur cognizance de droit come ceo*, or on any other fine which is executed; because, as the cognizance supposes a preceding gift, the cognizor cannot reserve to himself any thing out of lands, whereof he has already conveyed Bro. Ab. Tit. Fine pl. 30.

VOL. V. E away

away the absolute property ; so that the *reddendum* comes too late, when a precedent absolute gift without any such reservation is before acknowledged.

Roll. Ab.
Tit. Fine (O).
pl. 10.

§ 16. But if an estate for life only be reserved by the fine, the cognizor may then reserve a clause of distress ; because not having alienated the entire and absolute property to be in the cognizee, it is not repugnant to reserve a rent out of it.

Fines sur Cognizance de Droit tantum.
2 Com. 353.

§ 17. A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right only, without the circumstance of a preceding gift by the cognizor. This species of fine is generally used to pass a reversionary interest, which is in the cognizor ; for of such reversions there can be no feoffment or donation with livery supposed, as the freehold and possession during the particular estate is vested in a third person.

Co. Read. 3.

This fine may also be used by a tenant for life, in order to make a surrender of his life estate to the person in remainder or reversion ; and it is then called a fine upon surrender.

§ 18. The form of it is ; “ And the agreement is
“ such, to wit, that the aforesaid *A.* hath acknow-
“ ledged the aforesaid tenements, &c. to be the right
“ of the said *B.*, and he hath granted for himself and
“ his heirs, that the aforesaid tenements which *W. R.*
“ and *M.* his wife hold for the term of the life of the
“ said *G.* of the inheritance of the said *A.* on the day
“ on which this agreement was made, and which,
“ after

“ after the decease of him the said G., bought to re-
 “ vert to the said A. and his heirs, shall, after the de-
 “ cease of the said G., entirely remain to the said B.
 “ and his heirs forever.”

Fine is executory, and passes a fee-simple 1 Inst. 9 b.
 with the word *heirs*. It seems to have been the
 most ancient species of fine; for the demandant was
 obliged to follow the rules of law, and sue out a writ
 of possession: but when it became usual to procure a
 feoffment of the lands first, a writ of possession was
 unnecessary, which probably gave rise to *fin*es *sur cog-*
nizance de droit come ceo.

§ 20. If there be a tenant for life, remainder for Co. Read. 3.
 life, and the first tenant for life levies a fine to the per-
 son in remainder, *sur cognizance de droit tantum*, it will
 operate merely as a surrender of his estate for life; be-
 cause, by this fine, the tenant for life only acknow-
 ledges all the right which he had in the lands to be-
 long to the person in remainder. But if, in this case,
 the tenant for life had levied a fine *sur cognizance de* Vide infra.
droit come ceo, &c. it would create a forfeiture of both ch. 12.
 their estates, and the person in reversion might enter
 immediately; because a fine *sur cognizance de droit come*
ceo, &c. is always supposed to pass an estate in fee-
 simple, unless the contrary is expressly mentioned;
 whereas a fine *sur cognizance de droit tantum* only con-
 veyes all the right which the cognizor has, and no
 more.

Fines sur
Conceffit.
2 Com. 353.

§ 21. A fine *sur conceffit* is, where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right or gift, grants to the cognizee an estate *de novo*, by way of supposed composition, which may be either an estate in fee, in life, or even for years.

The form of this fine is; “ And the agreement is such, to wit, that the aforefaid *A.* hath granted to the aforefaid *B.* the aforefaid tenements, &c. to hold for 61 years.” It is executory.

Fines sur
Done Grant
& Render.
2 Com. 353.

§ 22. A fine *sur done grant ei render* is a double fine, comprehending the fine *sur cognizance de droit come ceo*, and the fine *sur conceffit*. It is used in order to create particular limitations of estates; whereas the fine *sur cognizance de droit come ceo* conveys nothing but an absolute estate, either of inheritance, or at least of freehold.

In this fine the cognizee, after the right is acknowledged to be in him, renders or grants back to the cognizor some other estate in the lands.

§ 23. The form of this fine is; “ And the agreement is such, to wit, that the aforefaid *A.* hath acknowledged the aforefaid tenements to be the right of him the said *B.* as those which the said *B.* hath of the gift of the aforefaid *A.* and those he hath remised and quit-claimed from himself the said *A.* and his heirs for ever, (warranty from the cognizor): and for this acknowledgment, remise, quit-claim, warranty,

“ warranty, fine, and agreement, the said *B.* hath
 “ granted to the said *A.* the aforesaid tenements, &c.
 “ and this he hath rendered to him, in the same court
 “ to hold the said tenements, &c. to the said *A.* and
 “ the said *B.* his body.”

Of this sort, the render must be made of the lands demanded in the original writ, or of something issuing out of those lands. Thus, if the cognizance be made of the manor of *Dale*, the cognizee cannot make a render of the manor of *Sale*; or if the cognizance be made of the third part of a manor, the render cannot be of the whole manor, because the court can only determine the right of that about which the parties contended, and which was demanded in the original writ: but if the cognizor acknowledges all his right in the lands to be in the cognizee, and the cognizee, in return, grants and renders to the cognizor a particular estate in the lands, or a rent or common out of it, the render is good, because the determination entirely refers to the things in dispute, one party taking the ultimate property in the land, and the other a particular estate in it; all which is comprehended in the original writ.

Co. R.
2 Ro.
15, 16

§ 25. It follows from the same principle, that the lands must be rendered in the first instance to some person named in the original writ; but an estate may be rendered to a person not named in the original writ by way of remainder, as well as in any other kind of concord.

Co. Read. 6.

§ 26. A fine *sur done grant & render* is executed as to the first part, and executory as to the second; for if the first part was not executed, it would be void, as the cognizee can have nothing to render to the cognizor until he is in possession.

100.

§ 27. This species of fine being generally used to create particular limitations of estates, is construed rather as a private deed or conveyance, than as a judgment in an adversary suit; and therefore it need not have such a precise form as other fines.

Tey's Case,
5 Rep. 38.

§ 28. Husband and wife levied a fine to *A. and B.* and the heirs of *A.* of the manor of *Layer de la Hay*, *Layer Britton*, and several other manors, and a great number of acres of land, meadow, pasture, &c. in *Layer de la Hay*, *Layer Britton*, &c. and in this fine several grants and renders were made. In the third render the manors of *Layer de la Hay*, and *Layer Britton*, *et tenementa prædicta* in *Layer de la Hay* and *Layer Britton*, were granted and rendered to the husband and wife, and to the heirs of the husband, and by the fourth render 115 acres of land in *Layer Britton* were granted and rendered to the wife in tail.

After the death of the husband, his brother and heir brought a writ of error, and assigned for error the repugnancy between the third and fourth render, for, by the third render all the lands in *Layer Britton* were granted to the husband and wife, and to the heirs of the husband; and, by the fourth render, part of the same tenements were granted to the wife in tail;

tail ; so that the same lands were granted to two different persons, which was repugnant and erroneous. It was observed, that a fine was of the same nature as a judgment, and as *Bracton* says, *Oportet ut res certa deducatur ad iudicium*. But the court resolved, that the fourth tender, as to that which was contained in the third tender, should be of the same condition and quality in construction, as a charter or other conveyance between party and party, and need not have such a precise form as a writ or judgment, and therefore that the fourth tender was good, and should invalidate the third tender as to the 115 acres.

§ 29. If lands be rendered by fine to a person and his heirs, the lands are thereby immediately bound ; and although the person to whom the render is made dies before execution, yet his heirs will have the lands ; for the fine having been levied in the life-time of the parties, the lands were so bound by it, that it could not be altered. 1 Rep. 156 a.

TITLE XXXV.

FINE.

CHAP. IV.

In what Courts Fines may be levied, and before whom acknowledged.

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| <p>§ 3. Court of Common Pleas.
 7. Of the County Palatine of Lancaster.
 8. Of the County Palatine of Chester.
 9. Of the County of the City of Chester.
 10. Of the County Palatine of Durham.
 12. Of the Great Sessions of Wales.
 14. Of the Isle of Ely.
 15. Courts of Ancient Demesne.
 17. Courts of Cities and Corporate Towns.</p> | <p>19. Before whom Fines may be acknowledged.
 20. Commissioners under a Writ of Dedimus Potestatem.
 25. Judges of Assize.
 26. How the Acknowledgment is to be certified.
 36. Rules respecting the taking of Fines by Dedimus.
 41. Lord Chief Justice of the Common Pleas.
 42. Justices of Wales.</p> |
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Section I.

A FINE being a composition of a suit commenced for the recovery of real property, it might originally have been levied in any court which had jurisdiction to hold pleas of land: and accordingly it appears that, in the early ages of the law, when courts were more numerous, and their jurisdiction more extensive than at present, fines were frequently levied in the Lord's Court, the Hundred Court, and the County Court; and in *Dugdale's Origines Juridicales* 92. there is a record of a fine which was levied in the county

county court of *Nottingham* in the reign of King *John*.

Fines were also levied in all the courts at *Westminster*, and even before the King himself, as appears from a great number of records which have been published in *Pollock's Glossary*, and by *Dugdale* and *Maddox*.

Dugd. Orig.
Jur. 50. 92.
Maddox
Form. Ang.
No 364.
4 Inst. 75.
Maddox
Exch.

§ 2. From the time of the appointment of Justices in Eyre by Hen. 2. fines were usually levied before them, on account of the pre-eminence of their court over the county courts; and *Maddox* preserved several concords of fines which are expressed to have been levied, *coram abbate de Evelshaam Johanne de Munmul, &c. Justiciariis itinerantibus*.

Glanv. lib. 8.
c. 5.

No 365, 366.
367. 369.
372.
Roll. Ab.
Tit. Fine (C).

§ 3. In consequence of the fixed residence of the Court of Common Pleas at *Westminster* by *Magna Charta*, fines were thenceforth usually levied in that court, because therein only could real actions be commenced; however, if a record was removed by a writ of error from the Court of Common Pleas into the Court of King's Bench, a composition of the suit might take place there, by which means a fine might be levied in that court.

Court of
Common
Pleas.
4 Inst. 99.

Denshall
Read. on
Fines 3.

§ 4. It is enacted by the statute *de modo levandi fines*, that fines shall be levied in the Court of Common Pleas, or before Justices in Eyre, and not elsewhere, and that a fine shall not be levied unless all the justices are present. But Lord Coke says, that

2 Inst. 515.

Co. Read. 8. that the latter part of this statute was repealed by implication by the statute 4 *Hen. 7.* so that now a fine levied in the Court of Common Pleas before two justices is considered to be equally valid, as if all the Judges were present.

514.
ed. 8.

§ 5. An opinion is advanced by *Coke* that a fine cannot now be levied so as to have the force of a final concord in any court but the Common Pleas; and therefore that the King cannot now, in contradiction to this negative statute, grant a power to hold pleas for the purpose of levying fines. He seems also to have been of opinion, that since this statute, fines cannot be levied in any inferior court, unless the privilege of holding such court has been confirmed by act of parliament; but this is certainly a mistake, for fines may still be levied in inferior courts, as will be shewn in a subsequent part of this chapter.

§ 6. The counties palatine of *Lancaster, Chester,* and *Durham*, having private courts of their own, the King's ordinary writs do not run there, so that fines could not be levied in the Court of Common Pleas at *Westminster* of lands situated in those counties, but this defect has been remedied by the following statutes.

Of the County Palatine of Lancaster.

§ 7. By the statute 37 *Hen. 8.* it is enacted, that all fines levied before the justices of the county palatine of *Lancaster*, commonly called Justices of Assize at *Lancaster*, or before one of them, of any lands, tenements, or other hereditaments lying or being within

within the said county palatine of *Lancaster*, which shall be openly read and proclaimed three several days in open sessions, in the presence of the Justices of Assize at *Lancaster*, or one of them for the time being; and also shall be openly proclaimed in the same manner at the two next general sessions that shall be holden in the said county palatine of *Lancaster*, at three several days in either of the said two sessions, after such manner and form as is commonly used in the Court of Common Pleas at *Westminster*, shall be of like force, strength and effect in law, to all intents, effects, constructions and purposes, as fines levied in the Court of Common Pleas.

§ 8. By the statute 2 & 3 Ed. 6. c. 28. it is enacted, That all fines levied or acknowledged before the high Justice of the county palatine of *Chester*, or before the Deputy or Lieutenant Justice there, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of *Chester*, which shall be openly read and proclaimed three several days in the open sessions, in the presence of the Justice of the said county palatine of *Chester*, or before the Deputy or Lieutenant Justice there, at the same sessions, that the same fine shall be engrossed, and also that it shall be openly read and proclaimed in the same manner, at the two next general sessions that shall be holden in the said county palatine of *Chester*, next after the levying and engrossing such fine, at three several days in either of the said two sessions, after such manner and form as is commonly used in the King's Court of Common Pleas at *Westminster*, shall be of like force, strength

Of the County Palatine of Chester.

strength and effect in law, to all intents, effects, constructions and purposes, as fines duly levied with proclamations before the King's Justices of his Common Pleas.

Of the Coun-
[redacted] City

§ 9. By the statute 43 *Eliz.* c. 15. § 3. it is enacted, that it shall and may be lawful to and for [redacted], upon any original writ or writs of covenant, or any other original writ or writs, whereupon fines have been usually levied, to be purchased out of the Court of Exchequer within the said county palatine of *Chester*, returnable before the Mayor of the said city, in the Portmoot Court to be holden within the said city, to levy any fine or fines of any lands, tenements, or hereditaments, lying or being within the said county of the said city of *Chester*, before the Mayor of the said city, in the said Portmoot Court, in such manner and form as fines may be levied before the high Justice of the county palatine of *Chester*; and that the Mayor of the said city shall have full power and authority to receive and record all and every such fine and fines, and that all and every such fine or fines which shall be so levied, and which shall be openly read and proclaimed before the Mayor of the said city, in the said Portmoot Court, once at the same court day that the said fine shall be ingrossed, and once at every of the nine next court days of Portmoot, next after the levying and ingrossing of such fine, shall be of like force, strength, and effect in law, to all intents, constructions, and purposes, as fines duly levied with proclamations before the said high Justice of *Chester*.

And

And by § 5. of the same statute it is enacted, That upon all such original writs, to be purchased out of the said Court of Exchequer aforefaid, for the levying of any fine or fines within the said city of *Chester*, the Mayor of the said city for the time being shall have full authority to award and send forth such like writs, process or precepts of *dedimus potestatem* to any two or more sufficient persons, authorising them to receive, and take the acknowledgment of such person or persons as shall be willing to levy such fine or fines, and by reason of sickness or other reasonable impediment cannot come in person before the said Mayor to make such acknowledgment.

§ 10. By the statute 5 *Eliz. c. 27.* it is enacted, that all fines levied before the Justice or Justices of the county palatine of *Durham*, for the time being authorised for that purpose, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of *Durham*, which shall be openly read and proclaimed two several days in the open sessions, in the presence of the Justices of Assize at *Durham*, or one of them at the same sessions, that the same fine shall be ingrossed, and also that shall be openly read and proclaimed in the same manner, at the two next general sessions that shall be holden in the county palatine of *Durham*, next after the levying or ingrossing of such fine, shall be of the same force, strength, and effect in law, to all intents and purposes, as fines duly levied with proclamations before the Queen's Justices of the Common Pleas at *Westminster*.

Of the County Palatine of *Durham*.

1 Will. Rep.
275.

§ 11. If a fine is found by verdict to have been levied before the Justices of the county palatine of *Lancaster*, without finding who those Justices were, and whether they had power to take fines or not; the court will presume them to be such Justices as had power by statute to take fines in the county palatine of *Lancaster*, if the contrary does not appear.

Great
Sessions in
Wales.

§ 12. Upon the reduction of *Wales*, courts of justice were erected there, in which all pleas of real and personal actions were to be held, and fines of lands situated there are levied in those courts under the authority of the statute 34 & 35 *Hen. 8*, c. 26. § 40. by which it is enacted, that all fines levied before the Justices of *Wales*, of lands, tenements, and hereditaments, situated within their jurisdiction, with proclamation made the same session, that the said fine shall be ingrossed, and in two other great sessions, then next to be holden within the same county, shall be of the same force and strength to all purposes as fines levied with proclamations be of, that be levied before the Justices of the Common Pleas in *England*.

Ch. 2.

§ 13. By the statute 27 *Eliz.* c. 9. all the clauses in the 23 *Eliz.* c. 3. are extended to fines levied in the courts of great sessions in *Wales*, and also in the courts of the counties palatine of *Lancaster*, *Chester*, and *Durham*.

Of the Isle of
Ely.
4 Inst. 220.

§ 14. The Isle of *Ely* is a royal franchise, the Bishop having, by a grant from *Hen. 1. jura regalia*, whereby he exercises both a civil and criminal jurisdiction;

dition; and therefore fines are levied in a court held by the Bishop's Justices, of lands situated within the franchise.

§ 15. The tenure of ancient demesne being a species of privileged villenage, the tenants thereof could not sue for their lands in the King's Courts of common law; but had the privilege of having justice administered to them in the court of the manor, by *petit writ of droit close*, directed to the bailiffs of the King's manors, or to the Lord of the Manor, whereof the lands were held.

Courts of
Ancient De-
mesne.
Black
4to.

In consequence of this principle, no fine can be levied in the Court of Common Pleas, of lands held in ancient demesne, for that would be a wrong to the lord of whom the lands were holden; as they would by that means become frank free, and not impleadable in his court: but as such tenants were allowed to commence actions in the court of the manor, they were also permitted to compound their suits there, by which means fines have at all times been levied of lands held in ancient demesne upon little writs of right close in the court of the manor. 2 Inst. 513.

§ 16. It was found by special verdict that the lands in question were held of the manor of *Wormelow*, which is *de antiquo dominico coronæ domini regis et antecessorum suorum*, impleadable in the court of the manor *per parvum breve de recto clauso corum seneschallo sectatoribus et domesmen ejusdem manerii, sive eorum locum tenens et attornat*: and that upon writs of

Hunt v.
Bourne,
Salk. 339.
Com. Rep.
93. 124.

right close fines had been time out of mind levied and leviabie in the same court. That *Thomas Guillym* was seised in tail of the said lands, and being so seised, 22 Car. 1. a fine was levied in the said court *secundum consuetud. prædict.* before *A. B. locum tenent. Willielmi Kyrle seneschalli et R. attornat. J. S. & [redacted] at. J. N. ad tunc sectator. et domesmen ejus [redacted] riae.* Then the fine was set forth, and it appeared to have been levied before the attornies of the suitors in *placito conventionis secundum consuetudinem manerii, come ceo qu'il a de son done.*

Dyer 111 b.

Fitz. N. B.
12.

It was determined by Lord Chief Justice *Holt*, and the other Judges, that a fine might be levied of lands held in ancient demesne in the court of the manor, though it is not a court of record, because it is but agreeable to the power of that court in other instances, for they may proceed to try the mise joined in a writ of right close, which is of a higher nature than a fine; whereas in all other inferior courts, on the mise joined, the cause must be removed into the Common Pleas by *recordari*; and the statute 18 Ed. 1. *de modo levandi fines* is but declaratory of the common law, and was made to rectify a mistake, that fines were leviabie in inferior courts upon bills or complaints, which cannot now be either by grant or custom, by reason of the negative words of that statute. But this does not extend to courts of ancient demesne, for then the statute 18 Ed. 1. would make fines of those lands leviabie in the Court of Common Pleas, which is not the case, such fines being reverfible by the lord, so that tenants in ancient demesne would be
under

under a double disadvantage, for a fine could not be levied of their lands in any court.

This judgment was affirmed by the House of Lords.

4 Bro. Ca. in
Parl. 66,

§ 16. Fines may be levied in the courts of cities and towns by custom, where such courts have power to hold pleas of land.

Courts of
Cities
and
Towns

Maddox has published a record of a fine levied in the town court of the city of *Coventry*, before the mayor and bailiffs of that town; and also a fine levied in the court of *Fordwick*, to which King Henry 8. was a party.

Form. Angl.
Nº 379. 394.

§ 18. A fine of this kind is however void, and may be reversed unless it appears that the court had a power of taking fines.

In a writ of error to reverse a fine levied in *Shrewsbury* before the bailiffs, the first error assigned was, that it did not appear they had any authority to take fines, and they could not have it by prescription, or by general words in the King's grant. The court said the fine was void, it not appearing by what authority the fine was levied; for it was in derogation of the Crown and of the profits of the Crown *pro licentia concordandi*.

Waring v.
Whale,
Eliz. 314.

S. P. 1 Leon.
188.

§ 19. With respect to the persons before whom fines may be acknowledged, it appears that originally those who were desirous of levying fines, acknow-

Before whom
Fines may be
acknow-
ledged.

ledged the concord in open court, and fines are still frequently acknowledged in the same manner, the parties appearing at the Bar of the Court of Common Pleas: but fines may also be acknowledged out of court.

Commission-
under a
of De-
as Po-
testatem.

§ 20. It appears from *Glanville*, li. [redacted]. that the suitors in the *curia regis* were at all [redacted] allowed to prosecute their causes by attorney, who was called *responsalis ad lucrandum vel perdendum*; and a plea might be thus commenced and determined, whether by judgment, or by final concord, as effectually as by the principal himself. *Per procuratorem itaque talem potest placitum illud deduci in curia et terminari, sive per judicium, sive finalem concordiam, adeo plene et firmiter ut per eum qui alium loco suo inde posuit.*

No. 369. 362. In consequence of this rule, fines were frequently levied by attorney; and in the *Formulare Anglicanum* there are several records of fines, which appear to have been levied by attorney, the chirograph being worded in this manner—*Hæc est finalis concordia facta, &c. inter Thomam de Preston per Alexandrum Wallensem, positum loco suo ad lucrandum vel perdendum, et Ranulphum, &c.* This practice was productive of several frauds*, and, therefore, the statute *de modo levandi*

* There is an instance in the rolls of parliament 18 *Edw.* 1. No. 9. vol. 1. p. 22. where a person complains, that having demised certain lands to another for twelve years, and agreed to levy a fine to confirm the demise, he appointed a friend of the lessee's as his attorney for that purpose, who acknowledged a fine of other lands to

levandi fines enacted, that the parties to a fine should appear personally in court, that the judges might have an opportunity of examining into their age and capacity.

§ 20. The inconvenience of compelling old and infirm persons to travel from the most remote parts of the kingdom to *Westminster*, produced a regulation which is usually called the statute of *Carlisle*, but which, in fact, is a writ addressed by *Edw. 2.* to the judges, 15 *Edw. 2.* for their government in taking the acknowledgment of fines. It ordains, that all parties who would acknowledge or render their rights or tenements to another by fine, should appear personally before the justices, so that their age, idiocy, or any other defect might be judged of by them. “ Provided notwithstanding, that if any person be by age or impotence decrepit, or by casualty so oppressed and withholden, that by no means he is able to come before you in our court, then in such case we will that two or more of you by assent of the residue of the bench, shall go unto the party so diseased, and shall receive his cognizance upon that plea and form of plea that he hath in our court, whereupon the same fine ought

2 Inst 512.

the lessee and his heirs for ever, et idem *Matheus* postea tulisset quoddam breve de conventionibus versus ipsum *Willelmum* de prædicto termino affirmando, prout idem *Mattheus* fecit ipsum *Willelmum* quendam attornatum facere, ad finem illum levandum coram justiciariis de Banco; prædictus *Mattheus* tamen fecit et procuravit erga attornatum illum qui fuit de notitia et amicitia sua, quod idem attornatus recognovit alia tenementa quæ fuerunt ipsius *Willelmi*, et in scripto inter eos confesso non contenta, &c.

“ to have been levied : and if there go but one, he
 “ shall take with him an abbot, a prior or a knight,
 “ a man of good fame and credit, and shall certify
 “ you thereof by the record, so that all things incident
 “ to the same fine being examined by him^{self} them,
 “ the same fines according to our for^{mer} ~~ance~~
 “ may be lawfully levied.”

In consequence of this regulation, a special commission issues out of the Court of Chancery, called a writ of *dedimus potestatem*, directed to a certain number of commissioners, reciting that a writ of covenant is depending before the justices of the Court of Common Pleas, between certain persons therein named, who are incapable from infirmity of appearing personally before the court, and authorising the commissioners to take the acknowledgment of the said parties concerning the matters contained in the writ, and directing them to certify such acknowledgment under their hands and seals to the Court of Common Pleas.

§ 22. Although this writ still appears to be granted upon a suggestion of infirmity in the parties, yet such suggestion is seldom true, the writ being usually obtained to save the expence or inconvenience of a journey to *Westminster*, or for the purpose of levying a fine in vacation time.

§ 23. The statute of *Carlisle* only gives authority to two of the justices, or to one of them, attended by an abbot or knight, to take the acknowledgment of fines ; but notwithstanding this restriction, writs of *dedimus*

dedimus potestatem were frequently directed to persons of inferior quality, from whence many abuses arose, which gave rise to the rule of court, *Pasch. 43 Eliz.* Wilton 78. by which it was ordered, that no writ of *dedimus potestatem* directed to commissioners to take the acknowledgment of any fine should be received or recorded, unless the acknowledgment was taken by some of the justices of one bench or other, or Barons of the Exchequer, or serjeant at law, or knight who was of the quorum. Custom has, however, so far prevailed against the positive authority, both of the statute and of this rule, that although a knight is always named in a writ of *dedimus potestatem*, yet he seldom is one of those who take the acknowledgment of a fine.

§ 24. By an order of the Court of Common Pleas, made in *Michaelmas* term, 39 *Geo. 3.* reciting, that the Lord High Chancellor had been pleased to direct, that no writ of *dedimus potestatem* to be executed in *England*, should issue under the great seal directed to any persons except the judges, serjeants at law, barristers of five years standing, or solicitors or attornies of some of the courts in *Westminster-Hall*, the judges of the Court of Session and Exchequer, advocates and clerks to the signet of five years standing in *Scotland*; it is ordered that, from and after the last day of the said *Michaelmas* term, no common recovery or fine shall be suffered to pass, unless the taking of the warrants for suffering any common recovery, or caption of any fine, be before one of the justices or barons of His Majesty's courts of record in *Westminster-Hall*, or one of the serjeants at law, unless an affidavit be made and filed, stating

that the commissioners taking the same are, to the best of the deponent's information and belief, either barristers of five years standing, or solicitors in some of the courts in *Westminster-Hall*, the judges of the Court of Session and Exchequer, or advocates and clerks to the signet of five years standing in Scotland.

Jenk. 227.
Dyer 224 b.

§ 25. The judges of assize may, in their circuits *per consuetudinem regni*, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law places in their judgment and integrity *: in such cases, however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus potestatem* is tested after the date of the acknowledgment, still the fine will be supported.

Argenton v.
Westover,
Cro. Eliz.
275.

§ 26. A writ of error was brought to reverse a fine, and the error assigned was, that it appeared upon record that the acknowledgment of the fine was taken by Chief Baron *Manwood*, on the 27th of *March*, and the writ of covenant and *dedimus potestatem* were tested on the 9th of *April*, so that the acknowledgment was taken without any authority; and by the statute 23 *Eliz.* the day of the acknowledgment ought always to be certified; but the court over-ruled this objec-

* There is a petition in the rolls of parliament 28 *Edw.* 3. No. 26. vol. 2. p. 261. from the commons beyond *Trent*, praying that a justice of one or the other bench should come twice each year into their counties, to take the acknowledgment of fines.

tion, saying it was good enough, and that otherwise they should reverse many fines.

§ 27. The commissioners appointed by writ of *dedimus potestatem* are directed by the statute 23 *Eliz.* c. 23. f. 5. to certify the acknowledgment of the fine within twelve months after it is taken, and also to certify the year and day on which the same was acknowledged.

How the acknowledgment is to be certified.

If the commissioners, in a writ of *dedimus potestatem*, refuse to certify the acknowledgment of a fine pursuant to this statute, within twelve months, a *certiorari* may be awarded against them, reciting the substance of the writ of *dedimus potestatem*, and the acknowledgment of the fine, commanding them to certify it; and in case of their refusal, an *alia*, a *pluries*, and an *attachment*, will issue against them.

Fitz. N. P. 146.

§ 28. If the commissioners die before they have certified the acknowledgment of a fine, their executors must certify it upon a *certiorari*; and, in case of their refusal, the same process lies against them as against the commissioners.

Idem.

§ 29. If a writ of *dedimus potestatem* be directed to two persons jointly, and only one of them takes the acknowledgment of the fine, it will be erroneous.

Downes v. Savage.
Cro. Eliz. 240.

§ 30. If a person has several writs of covenant depending against several persons in different counties, he may have a writ of *dedimus potestatem* directed to commissioners to take their acknowledgments severally.

Fitz. N. B. 327.

Anon. Cro.
Eliz. 576.

§ 31. A writ of *dedimus potestatem* was awarded to take the acknowledgment of four persons to the same fine. The commissioners returned the acknowledgment of three of the persons only. The court resolved that the fine should pass as against the three persons who had acknowledged it; and that the name of the fourth person should be erased out of the writ of *dedimus potestatem*.

It was resolved in the same case, that if a writ of *dedimus potestatem* be awarded to take the acknowledgment of three persons to the same fine, the commissioners need not take the acknowledgment of all the three persons at the same time, but may take the acknowledgment of one of them at one time, and of another of them at another time.

§ 32. A fine will not be reversed for any trifling error or mistake in the return made by commissioners under a writ of *dedimus potestatem*.

Earl of Bedford v. Forster, Cro. Jac. 27.

A writ of error was brought to reverse a fine taken by commissioners, because, upon the back of the writ of *dedimus potestatem*, it was *executio istius brevis patet in quodam pannello huic brevi adnexo*, whereas it ought to have been *in quodam schedula huic brevi annexa*. But all the court held it was but matter of form, and not material; for, although it be not properly said to be a pannel, yet a pannel and schedule are all one in substance, and no cause to reverse the fine.

§ 33. The writ of *dedimus potestatem* recites, that a writ of covenant is depending between the parties, and, therefore, should bear date after the writ of covenant.

Shep. Tou. 5.
Co. Read. 9.
1 Roll. Rep.
223.

A writ of error was brought to reverse a fine levied at the teste of the writ of *dedimus potestatem* after the writ of covenant; and it was held to be a manifest error.

Goburn v.
Wright,
Cro. Eliz.
740.
Herbert
Binion,
1 Roll.
794.

34. But if the writ of *dedimus potestatem* be tested on the same day with the writ of covenant, the fine will be valid.

A writ of error was brought to reverse a fine, because the writ of *dedimus potestatem* was tested on the same day with the writ of covenant, which was contended to be erroneous, because the writ of *dedimus potestatem* recites, that the writ of covenant is depending; whereas the writ of covenant could not be said to be depending until its return. But the court were of opinion that this was no error, for the writ of covenant may be said to be depending immediately on the purchase of it; and if a stranger should buy the lands before the return of the writ of covenant, it would be champerty.

Arundel v.
Arundel,
Cro. Eliz.
677.
Cro. Jac. 11.
5 Rep. 47 b.

§ 35. It is the duty of all those who are appointed commissioners in a writ of *dedimus potestatem*, to inform themselves by means of some people of credit, that the persons who acknowledge a fine before them, are really the parties named in the original writ. They should also be extremely attentive in examining whether

Petty's Case.
1 Freem. 78.

ther there be any married woman, infant, idiot, or lunatic, among the parties to the fine, as they are liable to be severely punished by the Court of Common Pleas for any fraud or wilful neglect in the execution of the trust reposed in them by that court.

Specific
taking
ing of Fine
by Dedimus
Wilson 82.
Vide Dean
v. Tidmarsh,
Barnes 143.

§ 36. By a rule of the Court of C. P. made in *Hil. 13 Geo. 2.* it was directed, that a fine acknowledged before commissioners should be allowed to pass, unless some person who was present when the fine was acknowledged should appear personally before the Lord Chief Justice of the court, and be examined upon oath touching the execution thereof.

This rule having been found, by experience, to be attended with inconveniencies, and not having answered the good purposes for which it was intended, the court made the following rules :

Wilson 85.

Hilary 17 Geo. 2. “ It is ordered, that instead of an
“ oath made *viva voce* of the due acknowledgment of
“ fines, an affidavit in writing on parchment shall be
“ made and annexed to every fine, in which the person
“ making the same shall swear that he knew the parties
“ acknowledging such fine ; that the same was duly
“ signed and acknowledged ; that the party or parties
“ acknowledging, and also the commissioners taking
“ the same, were of full age and competent under-
“ standing ; that the feme-coverts (if any) were solely
“ and separately examined apart from their husbands,
“ and freely and voluntarily consented to acknowledge
“ the

“ the same ; and that the cognizor or cognizors, and
 “ every of them, knew the same to be a fine to pass
 “ his, her, or their estate or estates ; which fine, to-
 “ gether with such affidavit annexed, shall be trans-
 “ mitted to the Lord Chief Justice, or some other jus-
 “ tice of this court, for his *allocatur* thereon, and
 “ the said affidavit shall remain annexed to such fine, and
 “ be kept with the same in the proper office : and it is
 “ ordered that every such affidavit, except where the
 “ persons, at the time of their acknowledging the fine,
 “ are in *Ireland*, or some other parts beyond the seas,
 “ shall be made by some attorney of the courts of
 “ *Westminster-Hall*.”

Hilary 26 & 27 Geo. 2. “ It is ordered, that in the Wilson 89.
 “ affidavits made in pursuance of the preceding rule,
 “ the person or persons so making the same shall swear,
 “ that the fine was duly signed and acknowledged
 “ upon the day and year mentioned in the caption ;
 “ and if there be any rasure or interlineation in the
 “ body or caption of such fine, that such rasure or
 “ interlineation was made before the party or parties
 “ signed the said fine, and before the caption was signed
 “ by the commissioners.”

§ 37. The Court of Common Pleas has, in some instances, dispensed with these rules.

A fine was taken before *Prentice* an attorney, and Say v. Smith,
Barnes 217.
Prentice a tradesman, as commissioners ; *Prentice* the
 attorney died without making the proper affidavit of
 the

the acknowledgment of the fine. One of the cognizors became a bankrupt, absconded, and did not surrender within the 42 days, as required by the statute. The fine was ordered to pass, on an affidavit of the due acknowledgment of it by *Prentice* the tradesman, notwithstanding the general rule requiring such affidavits to be made by attornies.

§ 38. Where fines have been acknowledged out of the kingdom, the judges have also remitted the strictness of these rules.

Fleetwood
v. Calenda,
Barnes 219.

The Lord Chief Justice, assisted by Mr. Justice *Clive*, made an order, that a fine should pass as to two of the cognizors, considering the particular circumstances of the case, notwithstanding the same was not signed by them. One of the commissioners attended and made oath, that this fine was duly acknowledged before him and another commissioner, by the cognizors at *Naples in Italy*; that the parties were of full age and good understanding; that the married woman was examined apart from her husband, and freely consented. The fine being taken from persons beyond seas, it was not within the order of the court, requiring an affidavit; and the signing of a fine by the cognizors is not absolutely necessary.

Heathcock
v. Hanbury,
Barnes 217.

§ 39. Two fines taken at *Hamburgh*, where the cognizors resided, were ordered to pass by all the four judges, upon an affidavit by a commissioner, of the due execution of each fine sworn before a clerk
in

in the chancery of the city of *Hamburg*, and authenticated by his certificate or attestation as a notary public.

A fine was taken at *Edinburgh*, and was regular in every respect, except that it was not taken in the presence of an attorney of any of the courts of *Westminster Hall*, who might have made the usual affidavit of its having been duly taken. An affidavit was made by *Seton* the demandant, that there was no such attorney in or near *Edinburgh*; and the court, on the motion of Serjeant *Davy*, who cited *Say v. Smith*, allowed the fine.

Seton v. Sinclair,
2 Black.
Rep. 883.

Ante f. 37.

§ 41. The Lord Chief Justice of the Court of Common Pleas may alone take the acknowledgment of a fine out of court, a privilege peculiar to that office, and which seems to be derived from custom and usage, for it does not appear that this power is given to the Lord Chief Justice by any statute. *Capitalis iusticiarius de banco solus per prerogativum officii sui potest capere recognitiones finium, absque dedimus potestatem.*

Lord Chief
Justice of the
Common
Pleas.
1 Hen. 7.
9.
2 Inst. 512.
Co. Read. 9.
Dyer 224 b.

If the Lord Chief Justice of the Court of Common Pleas be a party to the writ, he cannot take the acknowledgment of that fine *quia iudex in propria causa*. This rule extends to all other judges and commissioners.

Year-Book,
8 Hen. 6. 21.
Dyer 220 b.

§ 42. By the statute 34 & 35 Hen. 8. c. 26. f. 40. it is enacted, that fines shall and may be taken before the

Justices of
Wales.

the justices of *Wales*, of lands, tenements, and hereditaments, situated within their jurisdiction, by force of their general commission, without any writ of *dedimus potestatem*, to be sued for the same in like manner and form as is used to be taken before the King's Chief Justice of the Common Pleas in *E*

TITLE XXXV.

FINE.

CHAP. V.

Of the Parties to a Fine.

- | | |
|---|---|
| <p>§ 1. <i>Who may levy Fines.</i>
 3. <i>The King.</i>
 4. <i>The Queen.</i>
 5. <i>Married Women.</i>
 13. <i>Coparceners, Joint-tenants, and Tenants in Common.</i>
 14. <i>Persons outlawed, &c.</i>
 15. <i>Who are disabled from levying Fine.</i>
 16. <i>Persons having no Estate of Freehold in the Lands.</i></p> | <p>25. <i>Aliens.</i>
 26. <i>Infants.</i>
 30. <i>Infant Trustees may levy Fines.</i>
 33. <i>Idiots and Lunatics.</i>
 37. <i>Corporations.</i>
 38. <i>Women seized of Jointures.</i>
 39. <i>Ecclesiasticks seized are Ecclesiæ.</i>
 40. <i>What Persons may take Lands by Fine.</i></p> |
|---|---|

Section 1.

A FINE being considered as a common assurance or conveyance of real property, it follows that all persons of full age and sufficient understanding, may in general levy fines of those lands in which they have any estate of freehold, either by right or by wrong.

§ 2. Even persons who are blind, deaf, or dumb, or who are both deaf and dumb at the same time, may levy fines, if it appears that, notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a fine, and can express their meaning by writing or signs: and there are three instances

Who may
levy Fines.

Elliot's Case,
Carter 53.
Griffin v.
Ferrers,
Barnes 19.
Keys v. Bull,
Id. 23.

instances of persons born deaf and dumb, who were permitted to levy fines.

The King.
Dugd. Orig.
Jur. 93.
Maddox
Form. No
194.
7 Rep. 32.

§ 3. There are several records of fines published by *Dugdale* and *Maddox*, to which the King is a party. It was however much doubted in the reign of Henry I. whether the King could levy a fine; and the King's Majesty having consulted Lord Chief Justice *Popham* and Sir *Edward Coke* (then Attorney General) on this subject, they gave it as their opinion, that although the King could not be cognizor of a fine, because a writ of covenant could not be brought against him, yet that if a fine was levied to the King, he might then make a grant and render, which would be good and sufficient to bind him.

The Queen.
1 Inst. 3 a.
133 a.
4 Rep. 23 b.

§ 4. The Queen may levy a fine, and a fine may be levied to her; for she has in every instance the particular privilege of suing and being sued alone, and is considered in all legal proceedings as a feme sole, and not as a feme covert.

Married
Women.

Lib. ii. c. 3.
Form. Angl.
No 357.

5. As married women might always be impleaded jointly with their husbands, it follows that they could join with their husbands in levying fines: and it appears from a passage in *Glanville*, and some very ancient records published by *Maddox*, that it was formerly usual for married women to appoint their husbands as their attornies to levy the fine for them.

Maddox
Diff. i. 18.

Thus in 9 *Rich.* 1. the prior and convent of *Lewis* fined to the King in half a mark, *ut concordia facta inter*

inter Richardum de la Combe, & Sybillam de Dene, uxorem suam, presentes per eundem Ricardum virum suum, positum loco suo, ad lucrandum vel perdendum, et Willielmum Priorem et conventum de Lewis tenentem, per Willielmum monachum suum de advocacione ecclesiæ de Wadsworth recognitio de ultima presentatione summoniti per eos in prefata curia, scribatur in magno rotulo.

It is probable that married women were, in consequence of this practice, frequently deceived, and defrauded of their inheritances by their husbands. The statute *de modo levandi fines* therefore directed, that if a feme covert be one of the parties to a fine, she ought first to be examined by the justices, and if she refused her assent to the fine, it should not be levied.

18 Ed. 1.
2 Inst. 515.

§ 6. When a married woman is a party to a fine, she ought to be examined secretly and apart from her husband, pursuant to this statute, that the Judges or Commissioners may inform themselves whether she joins in the fine of her own free will, or is compelled to it by the threats and menaces of her husband. Every thing contained in the writ should be distinctly named to her; and she ought to be informed of the consequences of her assenting to the fine. But although the statute *de modo levandi fines* thus positively directs the private examination of a married woman, yet if she is allowed to acknowledge a fine without being examined, it will bind both her and her heirs for ever, there being no mode of reversing such a fine; because it cannot afterwards be averred, that

2 Inst. 515.
3 Atk. 712.

Penne v.
Peacock,
Forrest. R.
41.

the married woman was not examined, the contrary being recorded.

§ 7. The private examination of a married woman is, however, not directed in all cases, as that circumstance was prescribed by the legislature, *or* to prevent married women from making imprudent disposition of their property at the instance of their husbands; so that where a husband and wife acquire any interest by a fine, and depart with nothing, the wife need not be examined, because in that case she cannot possibly be prejudiced. It may therefore be laid down as a certain rule, that a married woman need only be privately examined in levying a fine, where she joins in granting some estate, or departing with some interest.

1 Inst. 515.
Lit. f. 670.
1 Inst. 353 b.

Roll. Ab.
Tit. Fine
(M. 1.)

If a fine be levied to a husband and wife who grant and render a rent, the wife ought to be examined, because by the render she makes herself liable to the payment of the rent.

7 Rep. 8 a
10 Rep. 43 a.
1 Inst. 46 a.
Hob. 225.

§ 8. If a married woman levies a fine of her own inheritance, without her husband, it will bind her and her heirs, because they will be estopped to claim any thing in the lands, and cannot be admitted to aver that she was a married woman, that being contrary to the record. But her husband may enter and defeat such fine, either during the coverture, to restore himself to the freehold which he held *jure uxoris*, or after her death, to restore himself to his tenancy by the curtesy; because no act of a *feme covert* can transfer

transfer that interest which the marriage has vested in the husband; and if the husband avoids the fine during the coverture, neither the wife nor her heirs will be barred by it; for, by the entry of the husband, the whole estate which passed by the fine is defeated, and the old estate of the wife revested in her, and the husband again seised in right of his wife.

1 Inst. 46 a.
n. 7.

Even an entry by the husband into part of the land, whereof the wife alone levied a fine, will avoid the whole fine.

Mayo v.
Combes,
1 Freem. Rep.
396.
Pollexf. 164.

§ 9. If a married woman levies a fine executory as a *feme sole*, and execution is sued against the husband and wife, the husband may stop the execution of the fine, because no act of his wife's can prejudice him. And if in a case of this kind the husband had made default, and his wife was received in his stead, she might for the benefit of her husband, prevent the execution of her own fine, but, after the death of her husband she cannot avoid it.

Co. Read. 7.
Perk. f. 20.

§ 10. If a woman levies a fine by the name of *Mary*, the wife of *Thomas Stiles*, it will be void; because it appears by the very record itself that the cognizor was a married woman.

1 Siderf. 122.

§ 11. It is agreed that a wife may, without her husband, execute a naked authority, though no special words are used to dispense with the disability of coverture: but if the legal estate in lands is vested in a married woman in trust for another, some hold that

W. Jones 137.
1 Inst. 112 a.
a. 6.

she cannot pass it to the *cestui que trust* unless her husband joins; and therefore, that if she makes a feoffment, or levies a fine without him, the first will be void, the latter voidable: but others are of opinion, that the husband's joining is not more requisite in this than in the former case.

§ 12. The following is the only case where a married woman has been allowed to levy a fine without her husband.

Moreau's
Case,
2 Black. Rep.
1205.

Upon a motion that *Ann Moreau*, wife of — *Moreau*, might levy a fine without her husband, it appeared that the lands had been sold by the husband, who covenanted that he and his wife (when of age) should levy a fine. When the wife came of age, she refused to join in it; but it was levied by the husband alone, who afterwards went abroad. The wife now consented to levy it, but the husband was absent. It was said that it had been usual in such cases for the curfitor to make out a *præcipe* to the wife as a *feme sole*; but no example of it was produced upon the motion. The Court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the Lord Chief Justice then in court.

Coparceners,
Joint-tenants,
and Tenants
in Common.
1 Rep: 58. a.
6 Mod. 45.
1 Salk. 286.

§ 13. Coparceners, joint-tenants, and tenants in common, may levy fines of their respective shares; and if there be two joint-tenants in fee, and one of them levies a fine of the whole, this will not amount to an ouster of his companion: but it is a severance

of

of the jointure, though they continue to be in of the old use.

§ 14. Persons outlawed or waived in personal actions, ~~may~~ alien by fine; for their estates still remain in them, ~~although~~ they have forfeited the rents and profits.

Persons outlawed, &c.
West. Symb.
p. 2. f. 13.

§ 15. Having enumerated the persons who are capable of levying fines, we shall now examine who are disabled from being cognizors, or conveying by fine. This disability may arise either for want of a sufficient estate in the lands, a competent degree of judgment and understanding, or from being incapacitated by their situation, or by some positive act of parliament.

Who are disabled from levying Fines.

§ 16. No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in them, either by right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it; so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in the lands whereof the fine is levied, it will only bind the parties themselves, and their heirs, but may at any same time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time when the fine was levied.

Persons having no Estate of Freehold in the Lands.
Shep. Tou.
14 West.
Symb. p. 2.
f. 13.

Infia ch. 14.

§ 17. A fine levied before entry or receipt of rent, will be void upon the same principle.

Lord Townshend v. Ash, 3 Atk. 336.

Upon a bill filed for a share in the New River water, the defendants pleaded a fine and non-claim, but it appearing that there was no entry nor receipt of rent until after the fine was levied, Lord *Hardwicke* said, there was not a sufficient *seisin* to support the fine. His Lordship also observed, that the receipt of rent with a continuance of possession before the levying the fine, might have been sufficient, because those acts would shew *quo animo* the fine was levied: so that if the rents had been received by the defendants before the fine was levied, and continued to be paid to them, it would have been the strongest evidence of possession.

Doer v. Williams, Cowp. 621.

§ 18. The tenant in possession will not be allowed as an evidence to prove the estate of a landlord who levies a fine, because he would then be a witness to support his own possession.

§ 19. A person having a defeasible right only to lands, may notwithstanding levy a fine of them, which cannot be set aside by the plea that neither of the parties had an estate of freehold in the lands.

Carter v. Barnardiston, 1 P. W. 505. 13 Vin. Ab. 336.

Sir *Michael Armin* being seised in fee of the manors of *Pickworth* and *Willoughby*, by his will devised, that in case his personal estate, &c. should not be sufficient to pay his debts, then his executors should receive the rents and profits of his whole real estate; and after payment thereof, he devised the manors of *Pickworth* and *Willoughby* to his uncle *Evers Armin* for life, and in case he should have issue male, then to such issue male

male and his heirs for ever; and in case he should have no issue male, he devised the manor of *Willoughby* to his nephew *Sir Thomas Barnardiston* in fee. Upon the death of *Sir Michael Armin*, *Evers Armin* entered upon the premises devised to him, and devised them to his grandson *Armin Bullingham*, and the heirs of his body. Upon the death of *Evers Armin*, *Sir Thomas Barnardiston* entered upon the premises, claiming the same by virtue of the remainder limited to him by the will of *Sir M. Armin*. *Armin Bullingham*, the devisee of *Evers Armin*, entered upon the manor of *Willoughby*, claiming the title thereto, and put his cattle into some part of the land, upon which ensued a replevin, and the special verdict in 3 *Lev.* 431. and 2 *Salk.* 224. This suit was afterwards compromised between *Sir Thomas Barnardiston* and *Armin Bullingham*, who both joined in a fine of the manor of *Willoughby*; but previous to this *Sir Thomas Barnardiston* had conveyed the premises by lease and release to *Sir Samuel Barnardiston* in mortgage.

It was contended that this fine was void, as neither of the parties had an estate of freehold in the lands; but the Lord Chancellor held, “ that in this case it could
 “ not be said that *partes finis nihil habuerunt*, because
 “ *Armin Bullingham*, on the death of *Evers Armin*,
 “ and as his devisee, had a right against all persons
 “ whomsoever but the heir of *Sir Michael Armin* the
 “ testator, and *Barnardiston*, entering upon him as a
 “ disseisor; and though *Barnardiston* afterwards mort-
 “ gaged the premises in fee, yet he continued in
 “ possession thereof, and joining with *Bullingham* in

“ the fine, it could not be said that *partes finis nihil*
 “ *habuerunt*, when one of them, *viz.* *Barnardiston*,
 “ had the possession, and the other of them, *viz.*
 “ *Bullingham*, had the right to the land against *Bar-*
 “ *nardiston*, and also against his mortgagee.”

§ Rep. 77 b.

§ 20. If a person who is only possessor of lands for a term of years, or who holds them by a statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to strangers, because the cognizor has no estate of freehold.

Co. Cop. f.
55-

§ 21. It follows from the same principle, that if a copyholder levies a fine of his copyhold, it is void, because the freehold is in the lord.

1 Inst. 337 a.
note.

§ 22. The only mode by which a tenant for years or a copyholder can levy a fine, so as to give it any force, is by first making a feoffment, by which means he acquires a freehold by disseisin. This doctrine has however been lately questioned.

Vide Tit. 36.

§ 23. There are two cases in which a fine is allowed to operate, although the parties have no estate of freehold in the lands. The first is where a *cestui que trust* levies a fine of his trust estate, of which the reason will be given in a subsequent part of this work. And the second is when the fine is levied by a vouchee to the demandant, or from a demandant to a vouchee, which is allowed, because in law the vouchee is supposed

Ante ch. 2.
f. 36.

posed to be tenant of the land, though in fact he never is so at present.

§ 24. The averment *quod partes finis nihil habuerunt* cannot be made by a person claiming as heir to the cognizor of a fine, and making his title to him or through him. But where a person makes mention of any of his ancestors, in the course of his pedigree only, and not as one from whom he claims, he is not barred by his fine, but may aver *quod partes finis nihil habuerunt*.

William Rogers, an idiot, being seised of a reversion in fee, *Andrew Rogers*, his uncle, levied a fine of the lands with proclamations to a stranger, and died in the lifetime of his nephew; upon the death of the idiot without issue, the grandson of *Andrew Rogers* entered and claimed the lands as heir at law to the idiot; and the question was, whether he was barred by the fine of his grandfather. *Croke* and *Berkeley* were of opinion, that as the lands never descended on *Andrew Rogers*, his grandson was not barred by his fine, but might aver *quod partes finis nihil habuerunt*, for he claimed nothing from him, but only mentioned him in the course of his pedigree.

Edwards v. Rogers,
Cro. Car.
524. 543.
1 Vent. 418.
Sir W. Jones
456.

§ 25. An alien not being capable of holding lands, ought not to be permitted to levy a fine; but if he does levy a fine, it will not conclude the King after office found. Aliens.

§ 26. By

Infants.

3 Keb. 480.

2 Leon. 159.

§ 26. By the common law, infants, or persons under the age of twenty-one years, are incapable of binding themselves by any contract, which may turn to their prejudice, on account of their supposed want of judgment and discretion at that period; in consequence of this principle, an infant is incapable of being cognizor in a fine; but if an infant is permitted to levy a fine, and that fine is not reversed during his minority, it must for ever afterwards stand good*.

The reason that an infant is restrained from reversing a fine levied by him, unless it is done during his minority, is, because that fact can only be tried by an inspection of his person in open court. *Non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo.* This mode of trial is adopted, because every judicial act shall be intended to have been rightly done, until the contrary appears; and therefore it is fitter that the propriety of such an act should be tried by the court, than by a jury.

1 Inst. 131 a.

380 b.

12 Rep. 123.

9 Rep. 31.

§ 27. In cases of this kind a writ issues to the sheriff, commanding him to constrain the party to ap-

* In the Rolls of Parliament 50 Ed. 3. N^o 127. vol. 2. p. 342. there is a petition from the Commons, complaining of the very great hardship of not permitting a person who had levied a fine, when an infant, to reverse it after he attained his full age; and praying that every person who had levied a fine during his infancy, should be allowed a certain time, such as two years after he attained his full age, to reverse it; to which the King answered, that he would consider against the next Parliament, whether it would be proper to alter the old law in this point or not.

pear, that it may be ascertained by the inspection of his person, whether he be of full age or not; *ut per aspectum corporis sui constare poterit, justiciariis nostris, si prædictus A. sit plenæ ætatis necne.*

The Judge may also examine the infant upon an oath of *voir dire*, or any of his parents, and inform themselves by means of church books, or any other kind of evidence, if there should still remain a doubt respecting the age of the party. 2 Roll. Abr. 573.

§ 28. The peculiar privilege thus given to infants, of averring against a record during their infancy, is probably owing to this cause. The Judges or Commissioners who take the acknowledgment of fines, are supposed to inspect the age of all those who acknowledge a fine before them, pursuant to the directions in the statute *de modo levandi fines*; and if, after such inspection, they are permitted to levy a fine, it is presumed they are of sufficient age; and the infant therefore cannot in that court aver his disability: but if upon a writ of error brought in a superior court he is inspected and found not to be of full age, the fine may be reversed; because the public inspection of an infant by the Judges in a Court of record, is of equal notoriety and authenticity with a former record of the infant's having levied a fine, (which supposes him to be of full age); and therefore, as both facts are recorded, and contradict one another, the latter fact will prevail. 3 Atk. 711.

12 Rep. 122.

If infancy were permitted to be tried by any other mode than the personal inspection of the infant in a Court of Record, averments might be made many years after a fine had been levied, that the person who acknowledged it was an infant at the time, by which means records might be avoided by bare averments, which would be productive of the greatest confusion.

1 Inst. 131 a.
Idem 380 b.
Keckwith's
Case,
Moore 844.

§ 29. If the person of an infant be inspected by the Judges, and it is once recorded that he is within age, although the infant should attain his full age, or die before the fix, is reversed, yet he or his heirs may reverse it, at any time afterwards.

Sarah Griffith's Case,
12 Mod. 444.

An infant acknowledged a fine, and the cognizee omitted to get it ingrossed until the infant should attain his full age, in order to prevent him from bringing a writ of error; the court, upon a view of the cognizance produced by the infant, and upon his prayer to be inspected, and to have his non-age recorded, inspected him and recorded his infancy, in order to give him the benefit of his writ of error; which he must otherwise have lost, as his non-age determined before the next term.

The principles here laid down respecting fines levied by infants are confirmed by the following cases: *Ann Hungate's case*, 12 Rep. 122. *Warfcomb v. Carrell*, *idem* 124. *Dyer* 220. *Herbert Parrot's case*, 2 Vent. 30. 1 Mod. 246. *Hutchinson's case*, 3 Lev.

36. *Sherlock's case, Sty. 457. Cousin's case, 1 Vent.*
 69. *Requisbe v. Requisbe, Bulst. p. 2. 320. And*
Poyntz's case, Cro. Jac. 230.

§ 30. By the statute 7 *Ann. c. 19.* it is enacted, that it shall and may be lawful to and for any person under the age of twenty-one years, by the direction of the Court of Chancery or Exchequer, on the petition of the persons for whom such infants shall be seised or possessed in trust, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said courts shall direct.

Infant Trustees may levy Fines.

3 Atk. 164.

§ 31. Upon a petition in Chancery, praying that an infant, the heir of a mortgagee in fee, who was likewise a feme covert, might convey by fine under this statute, the Master reporting it necessary: Lord Chancellor *Hardwicke* said, this question came before him soon after he had the seals, and that he consulted with Lord Chief Baron *Comyns*, who thought the court might order an infant who was a feme covert to levy a fine: for the act is general, that all persons under age shall convey and assure; and that as a feme covert of full age could not assure but by fine, the court may direct an infant to convey in the same manner; and an order was made accordingly.

Ex parte Maire,
3 Atk. 479.
Com. Rep. 615.

Vide 3 P. Wms. 387.

Lombe v. Lombe,
Barnes 217.
S. P.

§ 32. By the statute 4 *Geo. 3. c. 16.* it is enacted, that it shall and may be lawful for any infants having estates in lands, tenements, or hereditaments, within the dutchy of *Lancaster*, or the counties palatine of *Chester*, *Lancaster*, and *Durham*, or in the principality of

Wales, by the direction of the Court of the Dutchy Chamber of *Lancaster*, of the Court of Exchequer in the county palatine of *Chester*, of the Court of Chancery of the county palatine of *Lancaster*, of the Court of Chancery of the county palatine of *Durham*, and of the several courts of the Great Sessions in *Wales* respectively, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said several courts shall direct.

Idiots and
Lunatics.

§ 33. Idiots, lunatics, and generally all persons of non-sane memory, are incapable of levying fines; and the statute *q. modo levandi fines* expressly directs, that persons of this description shall not be permitted to acknowledge a fine: but still, if the Judges or Commissioners allow them to levy a fine, it can never afterwards be reversed by any averment that the cognizors laboured under any of those disabilities, because the record and judgment of the court being the highest evidence in the law, the cognizors must be presumed to have been capable of contracting at the time, and therefore no averment can be admitted to the contrary: and it is said that even a declaration of the uses of a fine by an idiot or lunatick will be good.

4 Rep. 124.

12 Rep. 124.

§ 34. One *Henry Bushley*, a monstrous and deformed cripple and idiot, was taken from his guardian, and carried to a place unknown, where he was kept in secret, until he had acknowledged a fine of his lands before Justice *Southcot*, to one *Bothome*, and had

had declared the use of the fine to *Bothome* and his heirs.

Henry Busbley was afterwards found by inquisition to have been an idiot, *a nativitate*, and upon an action brought by a person who claimed under *Bothome*, the idiot was sent out of the Court of Wards upon a man's shoulders, to be shewn to the Judges of the Court of Common Pleas. Lord Chief Justice *Dyer* said, that the judge who took the fine was not worthy to take another: but notwithstanding this, and although the monstrous deformity and idiotcy of *Busbley* was apparent and visible, yet the fine stood good.

It was moved as a doubt in the Court of Wards, whether this fine should not enure to the use of the idiot and his heirs; for although it was agreed, that the fine, being of record, bound the idiot, yet it was contended, that the deed executed by the idiot, was not sufficient to direct the uses of the fine; but it was resolved, "That for as much as he was enabled
" by the fine as to the principal, he should not
" be disabled to limit the uses which are but as ac-
" cessary."

2 Rep. 58 a.
Hob. 224.
Vide infra.

§ 35. One *Hugh Lewing*, who was an idiot, and so found by office, levied a fine, and declared the uses of it by indenture. It was resolved in the Court of Wards by the Lords Chief Justices *Wray* and *Dyer*, that both the fine and declaration of uses should stand good, as neither *Hugh Lewing* nor his heirs could aver that

Hugh Lewing's Case,
10 Rep. 42.
Winch 106.

that he was an idiot : and it was said by the court, that they would sooner suppose the office found to have been erroneous, than bring a judicial act into question, or the judgment of the court in which the fine was levied.

Lifter v.
Lifter,
Barnes 218.

§ 36. A complaint was made to the Court of Common Pleas, by *Thomas Cust*, supported by many affidavits, setting forth, that *Johanna Lifter*, one of the cognizors, in a fine lately levied, had for some years past been disordered in her senses, and was so at the time when the said fine was levied. The court thereupon made rule to shew cause why the fine should not be vacated, and for *John Hancock*, one of the commissioners, (who, with two others took the fine by *dedimus potestatem*,) to answer the matters in the affidavits. Upon an enlargement of the rule, the court recommended it to them to produce the said *Johanna Lifter*, who resided in *Yorkshire*, and accordingly she was brought into court : and being examined by the Lord Chief Justice, appeared to be a person of good capacity, and very well to understand the intent of a fine, and the deed declaring the uses thereof, which was in favour of her husband, with whom she had lived many years, and upon whom she was desirous to settle her estate, and prevent its descending to the said *Thomas Cust*, her nephew and heir at law. The court discharged the rule, with costs of the application, and the expences of the said *Johanna's* journey to *Westminster*, to be paid by *Cust*.

§ 37. Corporations aggregate cannot levy fines; because, as they are invisible bodies, they can only appear by attorney: whereas the statute *de modo levandi fines* requires that the parties to a fine shall appear personally before the judges. But Lord Coke says, that a sole corporation may acknowledge a fine.

Corporations.
Co. Read. 7.

§ 38. There are some persons who are restrained from levying fines among other modes of alienation by particular statutes. Thus, by the statutes 11 Hen. 7. c. 20. and 32 Hen. 8. c. 28. women seised of jointures or estates tail of the gift of their husbands; and husbands seised *jure uxoris*, are prohibited from levying fines of such estates. An account of these statutes, and of the several cases which have been decided on them, will be given in Title 36. ch. 8.

Women seised
of Jointures.

§ 39. All ecclesiasticks seised in right of their churches, as archbishops, bishops, deans and chapters, masters and fellows of colleges, &c. are restrained by a variety of statutes from alienating their church lands, for any longer time than for three lives or twenty-one years, in consequence of which they are by implication prohibited from levying fines.

Ecclesiasticks
seised *jure
ecclesie*.

1 Eliz. c. 19.
f. 5.
13 Eliz. c. 10.

40. With respect to the persons who are capable of being cognizees, and of taking any estate by fine, it will be sufficient to observe, that all those who are enabled by the common law to take by way of grant,

What Persons
may take
Lands by
Fine.
Shep. Ten. 7.

may also take an estate by fine, as infants, married women, corporations sole or aggregate (for an estate may be taken in a fine by attorney); or any other person, except those who are considered in law as civilly dead.

TITLE XXXV.

FINE.

CHAP. VI.

Of what Things a Fine may be levied.

- § 1. *Every Species of real Property.* | § 8. *New River Shares.*
 7. *Tithes.* | 10. *By what Descriptions.*

Section 1.

A FINE may be levied of every species of real property, as of an honour, manor, messuage, dovehouse, garden, orchard, land, meadow, pasture, wood, underwood, fishing, warren, fair, toll, waifs, estrays, common, &c. And, in general, it may be laid down as a certain rule, that a fine may be levied of every thing whereof a *præcipe quod reddat* or *faciat* lies.

Every Species
of real Pro-
perty.
Co. Read. 11.

There are even some things whereof a fine may be levied, although a *præcipe quod reddat* cannot be brought for them, as an office, for which neither a *præcipe* nor an assize lies, but only a *quod permittat*. Idem.

§ 2. A fine may be levied of an advowson in gross, or right of presentation to an ecclesiastical benefice, of which there are a variety of instances in the books. 8 Rep. 145 b.
1 Will. R.
p. 2, 242.

§ 3. A fine may be levied of a chief rent, a rent-charge, or any other rent which is actually *in esse*; but Shep. Tou. 11.
1 Stra. 106.

a fine cannot be levied of an annuity to a man and his heirs, because it is only a personal inheritance.

§ 4. A fine may be levied of any thing that lies in prender, provided it can be ascertained with sufficient accuracy; but of things uncertain, such as common without number, a fine cannot be levied.

Shep. Tou. 13. § 5. As fines may be levied of every kind of real estates in possession, so they may also be levied of all lands, tenements, or hereditaments, to which the parties are entitled in remainder or reversion,

Moor 250.
3 Rep. 88.
Shep. Tou. 12. § 6. A fine may be levied of an undivided part of a manor, messuage, or other real estate, as well as of the whole, and the writ must be for an undivided moiety, third or fourth part of, &c. &c. But if an entire thing, as a manor or messuage, be parted, as if the manor of S. be divided into two parts (if the division be so made that the manor of that part be not extinct) and a fine is levied of a part of it, it must pass by the name of the whole, as *de manerio de S. cum pertinentiis*.

Tithes. § 7. As the dissolution of monasteries by Hen. 8. the appropriations of the several rectories, parsonages, Tit. 22. f. 72. and other ecclesiastical benefices, which belonged to the religious houses, became vested in the king, who granted them to lay persons; and, in order to enable such persons to exercise every act of dominion over their new acquisitions, it was enacted by the statute 32 Hen. 8. c. 7. f. 7. that in all cases where any person or persons should

should have any estate or interest in any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit which should come into temporal hands and lay uses, they should have the same remedies as for other lands and tenements: “ And that
 “ writs of covenants and other writs of fines to be
 “ levied, and all other assurances to be had, made, or
 “ conveyed of any parsonage, vicarage, portion, pen-
 “ sion, or other profit called ecclesiastical or spiritual,
 “ as is aforesaid, should be thereafter devised and
 “ granted in Chancery according as had been used for
 “ fines to be levied and assurances to be had or made,
 “ or conveyed, of lands, tenements, or other heredi-
 “ taments; and that all judgments to be given upon
 “ any of the said writs original, so to be devised or
 “ granted, of or for any of the premises, or any of
 “ them, and all fines to be levied and acknowledged
 “ in any of the king’s said courts thereof, should be
 “ of like force and effect in law, to all intents and
 “ purposes, as judgments given, and fines levied of
 “ lands, tenements, and hereditaments in the same
 “ courts, upon writs original therefore duly pursued
 “ and prosecuted; albeit no such form of writs ori-
 “ ginal out of the said Court of Chancery had there-
 “ tofore proceeded or been awarded.”

§ 8. A fine may be, and is usually levied of New River shares, by the description of so much land covered with water; and whenever a fine is necessary to be levied of such shares, as the New River runs through three counties, *Hertford, Middlesex, and London*, there

New River
 Shares.
 2 P. W. 127.

must be three several fines for each of those shires, one being necessary for each county.

Tit. 1. f. 15.

§ 9. It has long been established in equity, that where a sum of money is covenanted or directed to be laid out in the purchase of land, such money is considered as land; but still a fine cannot be levied of it until it is actually laid out in the purchase of land.

By what Descriptions.

§ 10. With respect to the descriptions which are necessary to be used in a writ of covenant, of those things whereof fines are levied, they should be the same as those which are used in a *præcipe quod reddat*, in an adversary writ: but a fine being now considered as a common assurance or conveyance by consent, it is construed more favourably than a judgment.

Co. Read. 12.

§ 11. An honour may pass by the name of a manor, or by its proper name, as *de honore de T.* or *de manerio de T.* and where a manor is demanded, it is sufficient to describe it by its name, without mentioning the town wherein lies, for it may be out of any town, or extend into several towns.

West. Symb.
f. 27.
Shep. T. 13.

§ 12. Where a manor extends into several towns, as *A. B.* and *C.* it is good to express all or none; for if any one of the towns be omitted, it is said, no part of the manor situated in that town will pass; although a fine of the manor with the appurtenances would have carried the whole manor.

§ 13. It was formerly held, that where a fine was levied of a manor, nothing but a real manor would pass, and not a reputed manor. But it has long since been agreed, that a manor in reputation only will pass in a fine by the word manor; and that, when a fine is levied of a manor with its appurtenances, lands reputed to be parcel of the manor will pass.

Mallet v. Mallet, Cro. Eliz. 524. 707. Sir M. Finch's Case, 6 Rep. 63.

§ 14. If a person has two manors, which are both known by the name of *Dale*, and he levies a fine of the manor of *Dale* generally, circumstances may be given in evidence to prove which manor was intended to pass by the fine.

Gilb. Ev. 38. Bull. N. P. Ed. 1790. p. 297. 6 Mod. 235.

§ 15. Parsonages, rectories, advowsons, vicarages, or tithes impropriate, do not pass by the words "the advowson of the church of S." but by the words "the rectory of the church of S. with the appurtenances;" for the word *rectory*, comprehends the parish church, with all its rights, glebes, tithes, and other profits whatsoever*.

Shep. Tou. 12.

When a fine is levied of a right of presentation to a church only, the words are "of the advowson of the church at S." and not "with the appurtenances:" of all vicarages endowed, the writ must be "of the advowson of the vicarage of S." and not "with the appurtenances;" and where no vicarage is endowed,

Idem.

* *Rectoria pro integrâ ecclesiâ parochiali cum omnibus suis juribus, prædiis, decimis, aliisque proventuum speciebus; alias vulgo dictum beneficium.* Spelman Gloss. voce *Rectoria*.

it must pass under these words, “ the advowson of the
“ church of S.”

Shep. T. 12. § 16. Land ought to be demanded by the certain measure of its quantity, according to the usual mode by which it is measured, as an acre, oxgang, hide, rood, &c. and by the names which are usually given to the different species of land, as arable, meadow, pasture, &c.

Waddy v. Newton,
8 Mod. 276. § 17. Where a fine was levied of a certain number of acres of land, it became a question, whether the acres were to be considered as customary acres, or according to the statute *de terris mensurandis*; nor does it appear how the case was determined; but Lord Coke mentions a case where it was adjudged, that in a common recovery of a certain number of acres of land, they should be estimated according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*.

Sir J. Bruyn's
Case, 6 Rep.
67 a.

§ 18. The particular vill or hamlet, town, hundred, and county in which the lands lie, ought to be mentioned in the fine: and, where a fine was levied of lands lying in two vills, and one of the vills only was mentioned in the writ, it was held, that the lands lying in the other vill did not pass.

Stork v. Fox,
Cro. Ja. 120.

§ 19. Upon a special verdict, it appeared that there were two vills, *Walton* and *Street*, in the parish of *Street*, a fine was levied of certain lands in *Street*; and whether the lands in *Walton* passed by that fine was the question.

question. It was adjudged that they did not pass, for *Street* being a distinct vill, and so found by the verdict, although the parish of *Street* comprehended them both, yet the lands in *Walton* were not comprised in the fine. But if the fine had been levied of lands in the parish of *Street*, then all had well passed.

§ 20. It was found by special verdict, that *John Easton* being tenant in tail of a certain messuage and lands called *Easton's*, lying in *Bishop's Morchard*, levied a fine thereof by the name of a messuage and 200 acres of land, 50 acres, &c. in *Effington*, *Easton*, and *Chilford*, to the use of him and his heirs; and that there was not any vill, or hamlet, or place, known by the name of the messuage or tenement called *Easton's*, out of the vills or hamlets; and that none of the said tenements were in *Effington* or *Chilford*. The question was, whether upon this matter found, a fine levied of lands in places known in a vill, not mentioning the vill or hamlet where the lands are, was good? All the judges delivered their opinions *seriatim*, that the fine was good.

Faveley v.
Easton, Cro.
Car. 269—
276.

§ 21. If a fine be levied of lands in *A.* and the party hath also lands in *B.*, yet if the constable of *A.* is also constable of *B.*, all the lands shall pass; for, in such case, both places constitute the same vill.

Upon a special verdict, it appeared, that a fine had been levied of all the cognizor's land in *A.* and that he had lands in *B.* That a tithing-man was appointed in

Waldron v.
Roscarriot,
1 Mod. 78.
1 Vent. 170.

B.,

B., but that the constables of *A.* exercised their authority not only in *A.* but also in *B.*

Hale, Chief Justice.—"It is true one parish may contain three vill: the parish of *A.* may contain the vills of *A. B.* and *C.*, that is, when there are distinct constables in every one of them; but if the constable of *A.* doth run through the whole, then is the whole but one vill in law; or where there is a tithing-man, it may be a vill: but if the constable run through the tithing, then it is all one vill. I know where three or four thousand pounds a year hath been enjoyed by a fine levied of land in the vill of *A.* in which are five several hamlets, in which are tithings; but the constable of *A.* runs through them all, and, upon that, it was held good for all. Here was a case of the constable of *Blandford Forum*, wherein it was held, that if he had a concurrent jurisdiction with all the rest of the constables, the fine would have passed the lands in all: in some places they have tithing-men, and no constables."

§ 22. A fine may be levied of a close by a known name, without mentioning the vill or hamlet in which it lies.

Monk v. Butler, Cro. Jac.
574.

In trespass the question was, whether a fine might be levied of a close by a known name in a vill, without mentioning the vill or hamlet in which it lay? And adjudged that the fine was good enough; for it was but the agreement of the parties; which, being recorded,

corded, although there was neither vill nor hamlet mentioned wherein it lay, was good enough. And, notwithstanding it was objected that a *præcipe* ought to be in a village or hamlet, or place known out of a village or hamlet, as appeared by all pleadings, for if the place known be within a vill or hamlet, the *præcipe* ought to be brought accordingly : yet it was answered, that this was true in a *præcipe* or other writ to which the defendant was to answer, but this being but a concord and agreement of the parties, and no exception taken, but the fine drawn and passed, it was good.

§ 23. The word *tenement* is not a sufficient description of any thing whereof a fine is levied, for a tenement may consist of a messuage, land, meadow, or any other thing which lies in tenure. And there is an instance where a fine levied of two tenements was reversed by writ of error.

Stud and
Courtney's
Case, 1 Leon.
188.

§ 24. When a fine and recovery are of a certain number of acres in *Dale*, it is said, that the party interested shall have his election where and in what parts of the estate the fine and recovery shall operate.

Blany v.
Mahon,
4 Bro. Parl.
Ca. 76.

§ 25. It is also said, that the deed by which the uses of a fine and recovery are declared, is the measure by which juries usually go in ascertaining the description of the estates whereof a fine is levied ; and that courts of justice have frequently directed the description of lands in a fine to be amended, in conformity to the deed of uses. But a fine will not pass a greater number

Eyton v.
Eyton, 4 Bro.
Parl. Ca. 149.

Jenk. 254.

ber

ber of acres than are contained in the writ and concord, although the deed of uses mentions more.

Vide Tit. 32.
ch. 14. f. 13.

§ 26. A fine does not ascertain, but only comprises the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses, that the precise lands comprehended in the fine, and intended to pass by it, may be ascertained.

2 Atk. 241.
2 Vef. Jun.
138.

§ 27. There are frequent instances of tenants in fee-simple, who, in levying fines, insert more parcels of land than do actually belong to them; in which cases, Lord *Hardwicke* says, a court of equity will restrain the operation of the fine, to such lands only as do really belong to the parties.

TITLE XXXV.

FINE.

CHAP. VII.

In what Cases Fines may be amended.

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| § 2. <i>Original Writ.</i> | § 17. <i>No change of Christian Name allowed.</i> |
| 5. <i>Entry of the King's Silver.</i> | 18. <i>A Fine cannot be amended after Exemplification.</i> |
| 6. <i>Proclamations.</i> | |
| 9. <i>Description of the Lands.</i> | |
| 16. <i>A Fine recorded of one Term will not be altered to another.</i> | |

Section I.

FINES being now considered as common assurances made with the consent of the parties, the Court of Common Pleas has frequently permitted them to be amended, where any palpable mistake or misprision has been made by the officers of the court, in the entry of the king's silver, the proclamations, or the description of the lands.

§ 2. The judges have even, in some instances, directed the original writ upon which a fine has been levied, to be amended; but the propriety of such amendments seems from some modern determinations, to be extremely doubtful.

Original
Writ.

A writ of error was brought to reverse a fine; and the error assigned was, that the writ of covenant bore

Gage's Case,
5 Rep. 45 b.

teste

teste the 24th of *April*, returnable *quind. Pasch.* which was the 15th of *April*; so that the return was before the *teste*. It was resolved by the whole court, that the writ should be amended, because fines were nothing more than common assurances, entered into with the mutual consent of the parties.

This case, however, is said to be totally misreported; and the doctrine here laid down, that an original writ may be amended, has been contradicted by the following determination.

Lord Pembroke v. Lord Jeffries,
1 Salk. 52.
Cases Temp.
Holt. 59.

§ 3. Lord Pembroke petitioned the House of Lords for a bill to set aside an amendment made in a fine and recovery, by the Court of Great Sessions in *Wales*. It was referred to the judges, whether the fine and recovery were amendable in those particulars in which they had been amended, and whether such amendments were warranted by law. One of the amendments was in the original writ, which had been tested six months after the *dedimus* for the caption. Lord Chief Justice Holt certified the opinion of the judges to be, that the writ of covenant being an original writ, was not amendable, either by the common law, or by any statute. That neither the 14th *Edw.* 3. nor the 8th *Hen.* 6. warranted such an amendment. That, as to this purpose, there was no difference between adversary actions and amicable ones: for no court could amend a mistake in a deed, which was as much a common assurance as a fine or recovery, and that *Gage's* case was misreported, and was not law.

In Lord *Raymond's Reports*, vol. ii. 1066, it is said by Mr. Justice *Powell*, that the *teste* of an original writ was not amendable; that it was so resolved by the House of Lords, with the concurrent opinion of all the Judges, upon consideration of *Gage's* case, in the case of Lord *Jeffries*, and a judgment given in *Wales* upon the authority of that case, was reversed; and, upon that occasion, the record of *Gage's* case was searched for, and found not to warrant the report. And *Holt*, Ch. J. said, that the record of *Gage's* case is in *Coke's Entries*, tit. *Error*, p. 9. 250. where the judgment of the court is contrary to the report; for the writ was not amended, but the fine was reversed.

§ 4. In a late case, the Court of Common Pleas refused to amend the return of a writ of covenant on which a fine had been levied, because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir *William Blackstone* observes, that the court gave no opinion as to the propriety of such an amendment in a fair case.

Lindsay v. Gray, 2 *Black. Rep.* 1013.

§ 5. A mistake in the entry of the king's silver will be allowed to be amended.

Entry of the King's Silver.

Husband and wife being seised of the manor of *Empoles*, levied a fine thereof by the name of the manor of *Empoles*, and of a great number of acres of land, meadow, &c. according to the common form of fines; and the manor and tenements were valued at 20 marks *per annum*, so that the fine in the *Hanaper* was 1 *l.* 6 *s.* 8 *d.*, and, therefore, the king's silver, or post fine, amounted

Bohun's Case, 5 *Rep.* 43.

amounted to 40 s. The clerk made the entry of the king's silver in this form: *Nich. Bobun dat dominae reginae 40 s. pro licentia concordandi, &c. in placito conventionis* of so many acres of lands, meadow, &c. omitting the manor: and error being assigned on this point, because the king's silver was not mentioned to be paid, as well for the manor as for the other tenements, it was resolved by all the judges, that the roll of the entry of the king's silver should be amended according to the writ of covenant; the note, the foot, and the certificate of the judges in these words; *de manore de Empoles, cum pertinentiis ac, &c.* which were omitted through the negligence of the clerk, for it appeared that the whole sum was paid, as well for the manor as for the residue of the tenements; so that no prejudice was done to the queen.

Proclamations.

§ 6. The proclamations in a fine may also be amended, even after a writ of error has been brought, in which a defect in the proclamations is assigned for error.

Dowling's Case, 5 Rep. 44.

Thus, the proclamations which were indorsed on the foot of the fine were, pending a writ of error, allowed to be amended, according to the proclamations on the

Down's Case, Idem.

note of the fine remaining with the chirographer. And, in another case, the proclamations of a fine were allowed to be amended, after a writ of error had been brought, in which that circumstance was assigned for error.

§ 7. So, where a mistake had been made in the third proclamation on the foot of the fine, and the fourth proclamation was altogether left out; but it appearing that the proclamations upon the record remaining with the chirographer, and in the book of the chirographer were properly made, it was adjudged that the errors in the proclamations should be amended.

Pettus v. Godfolve,
13 Rep. 54.

§ 8. In the same manner, where a fine was levied in *Mich. 11 Eliz.* and the proclamations indorsed by the chirographer, were right. But in the note of the fine delivered to the custos brevium, the second proclamation appeared to have been made on the 20th of *May*, where it should have been the 23d of *May*. The court held, that it should be amended; for the engrossment upon the fine by the chirographer is the foundation, which being right, is a sufficient warrant to amend the other, though the court held it a good fine without any amendment.

Strilley's Case, Hut.
122.

§ 9. The description of the lands intended to be comprised in a fine is frequently erroneous; but, in such cases, whenever the description is contrary to the intention of the parties, it will be amended, provided such intention appear from the deed to lead the uses of the fine, or any other sufficient circumstances.

Description of the Lands.

§ 10. Serjeant *Pemberton* moved to amend a fine which was levied of the manor of *Ighfield*, where the deed which declared the uses was of the manor of *Ightfield*, which was the true name, and it was amended.

1 *Ld. Raym.*
209.

Tregate v.
Genays,
Pig. Recov.
218.

§ 11. It appeared to the court, after the examination of the plaintiff and deforciant, the inspection of a fine levied between the parties, and the indenture declaring the uses of the fine, that by the omission or misprision of the clerk who made and engrossed the *præcipe* and concord of the said fine, he supposed the said tenements to lie among others in the parish of *Lanceston*, when, in fact, there was no such parish within the whole county of *Cornwall*; but it ought to have been in the parish of *St. Stephen's* near *Lanceston*. It was ordered by the court, that as well the *præcipe* and writ of covenant, as all entries and records of the said fine, should be amended and rectified, by putting in the words *St. Stephen's* near, as, by law, it ought to be done.

Walker v.
Okenden,
Cases of
Pract. 52.

§ 12. So, where a motion was made to amend a fine, by inserting the word *Woorth*, and, on shewing cause, the rule was made absolute for the amendment, although it was objected, that the heirs at law would be prejudiced by the amendment. But the court said, they could not take notice whether it would be prejudicial to the heir at law or not, as it was the duty of the court to make the fine agreeable to the deed of uses, and to the intention of the parties.

Forster v.
Pollington,
Barnes 216.

§ 13. Two fines of lands in the island of *Antigua* were ordered to be amended, upon hearing counsel for the cognizee and the heirs at law of the cognizors, who had brought writs of error to reverse the fines. The lands were described in the writs, &c. *In insula de Antegoa in America in partibus transmarinis, viz. in parochia*

parochia Sanctæ Mariae Islington in comm. Midd. The amendment was by striking out the words *in America in partibus transmarinis*. Articles of agreement between the parties to the fines, to convey and assure the lands in the island of *Antigua*, were read, and *per curiam*, the repugnancy inserted merely through want of skill, and which would vitiate the fines, must be rejected, and the fines made effectual, that is, in common form; if they be then insufficient, advantage may be taken thereof.

§ 14. A fine levied in 1 Geo. 1. was ordered to be amended according to the deed of uses, by striking out the word *parochia*, and inserting the word *parochiis*; and also by inserting the words *et Melbmerby*. And in *Pasch.* 10 Geo. 3. a fine levied in the reign of queen *Anne* was amended by a deed of settlement upon marriage, by altering the name of a parish in the fine, from *Coxley* to *Corley*; upon reading the deed, the indenture of the fine, and an affidavit, that there was no such parish as *Coxley* in the county where the lands lay.

Craghill v.
Pattison,
Barnes 24.

Bohoun v.
Burton,
3 Will. Rep.
58.

§ 15. The Court of Common Pleas will not, however, allow the number of acres inserted in a fine to be increased where the deed of uses is general, and the fine is levied by a husband and wife.

On a motion to amend a fine by increasing the number of acres, the deed of uses being general, and the intent only proved by affidavit, Lord Chief Justice *De Grey* observed, that amendments anciently were only

Powell v.
Peach,
2 Black. R.
1202.

of errors in the proceſs of fines, or miſtakes in the deſcription of the premiſes; and theſe were amended by other parts of the ſame record: but the amendment then requeſted varied the extent of the premiſes from 50 to 84 acres. This, indeed, might be done upon principle, provided it was intended by the parties: but what was the evidence of that intent? The deed to lead the uſes could not be legal evidence of the wife's intent, becauſe ſhe was not examined as to the deed, as ſhe was to the fine, and ſo there was nothing to amend by.

Sir *W. Blackſtone* thought the deed of uſes ſufficient evidence of the intention of the parties, and that it had always been allowed as ſuch even in the caſe of *femes covert*s; *Luggins v. Rawlins, Barnes*. But what did the deed of uſes ſay? It deſcribed no number of acres; that was to be proved by *viva voce* evidence, which was too dangerous. He could find no precedent where the quantity or number of acres had been increaſed, much leſs nearly doubled as in this caſe, and was not for making a precedent which would give ſuch an inlet to fraud.

A Fine recorded of one Term will not be altered to another.

§ 16. Although the Court of Common Pleas will amend a fine in matters of form, yet, where a fine is recorded of one term, the court will not alter it and make it a fine of another.

Heath v. Sir J. E. Wilmot, 2 Black. Rep. 778. *Wilſon on Fines* 58.

A fine was taken on the 1ſt of *October* 1770, 10 *Geo.* 3. and acknowledged before commissioners, in which *Sir John Eardley Wilmot* (then Lord Chief Juſtice of the Court

Court of Common Pleas) and others were cognizors, which was passed, engrossed, and recorded as a fine of the preceding *Trinity* term; Sir *John* had nothing in the lands until a few days before he acknowledged the fine, and, therefore, in the deed to lead the uses thereof, it was covenanted by the parties, that the fine should be levied as of the *Michaelmas* term next ensuing the acknowledgment of the fine, but by mistake the fine was recorded as of the preceding *Trinity* term. Upon producing the deed to lead the uses of the fine, and shewing the mistake, it was moved that the fine might be altered, and made a fine of *Michaelmas* term, according to the covenant in the deed of uses; but Lord Chief Justice *De Grey*, and the whole Court observed, that this was not a motion to amend a fine, but to make a new fine; for Sir *John Eardley Wilmot* having nothing in the lands at the time when the fine was levied and recorded, it could only operate as a bar to himself and those claiming under him, so that the granting of this motion might prejudice the rights of strangers.

§ 17. No change of the christian names of parties to a fine is allowed by way of amendment.

No change of
Christian
Name allow-
ed.

On a motion to alter the name of the demandant in a fine from *Robert* to *John* on an affidavit by the attorney concerned, that *John Dixon* was the party meant who had purchased a part of the estate, and that no deed to declare the uses of the fine had been executed, the court refused the motion.

Dixon v.
Lawson,
2 Black.
Rep. 816.
Ex parte
Motley,
2 Bos. & Pul.
Rep. 455.

A Fine cannot be amended after Exemplification.

§ 18. By the statute 23 *Eliz. c. 3. f. 10.* it is enacted, that no fine levied before that act, which shall be exemplified under the Great Seal, shall, after such exemplification, be in anywise amended. And by the statute 27 *Eliz. c. 9. f. 10.* no fine levied before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverford West*, or under the seal of any of the counties palatine, shall, after such exemplification, be in anywise amended.

TITLE XXXV.

FINE.

CHAP. VIII.

Of the Force and Effect of a Fine at Common Law, and by the Statutes of 18 Edw. 1. 27 Edw. 1. and 34 Edw. 3.

§ 1. <i>Force of a Fine at Common Law.</i>	11. <i>Of the Statute De Finibus Levatis.</i>
7. <i>Of the Statute De Modo levandi Fines.</i>	13. <i>Of the Statute of Non-claim.</i>

Section 1.

HAVING stated the various circumstances which are necessary to the levying a fine, we shall now proceed to investigate the effects with which it is attended.

Force of a
Fine at Com-
mon Law.

By the common law all decisions of the King's courts were allowed the utmost force in ascertaining the rights of the contending parties: now a fine being considered as a composition of a suit actually commenced, and the concord of a fine coming in lieu of the sentence which would have been given in case the parties had not agreed to terminate the suit in this manner, it was allowed to have the same force and effect as a judgment of a court of justice in a real action. This idea seems also to have been adopted

Plowd. 357.

Cod. lib. 2.
Tit. 4. l. 20.

Vin. de
Transact.
c. 8. n. 3.

from the civil law ; for it is said in *Justinian's* code, *non minorem auctoritatem transactionum quam rerum judicatorum esse recta ratione placuit.* And the rule laid down by modern civilians is, *transactio inter ipsos transigentes eandem vim habet quam res judicata, et propterea causa transactione decisa et finita, non magis quam sententia retractatur, nec aliqui nullus sit litium finis.*

1 Inst. 327 b.

Ch. 14.

§ 2. The delivery of possession by the sheriff after a fine was levied, in pursuance of the writ of *habere facias seisinam*, which issued for that purpose, being equal in point of notoriety to the ceremony of livery of seisin, it was therefore established, that a fine not only transferred the possession, but also the right of possession. It does not however take away the right of entry of those who have a title to the land, unless where it is levied by a tenant in tail in possession, in which case it operates as a discontinuance of the estate tail ; so that the remainder-man or reversioner is barred of his entry, and has only a right of action left : for although the statute *de donis* says, *et si finis super huiusmodi tenementum in posterum levetur ipso jure sit nullus*, yet these words were only held to extend to the right of the issue in tail, and not to their possession. There are however several cases, in which a fine does not operate as a discontinuance of an estate-tail, which will be taken notice of in a subsequent part of this work.

§ 3. A final judgment in a writ of right, and a chirograph of a fine, were originally considered as perfect

perfect bars to all claims whatever from the moment they were completed. Thus *Maddox* has transcribed a record of the 10 *Rich.* 1. where *Roger de Wermedale* was impleaded for lands, of which a fine had been levied: and it was adjudged that he should hold the lands in peace, and that none of the said persons could rightfully implead him, as they were in *patria* when the fine was levied, and made no claim: *Recordatum est per eosdem barones quod post finem et concordiam factam inter prædictos Matildam et Rogerum, &c. traxerunt prædictum Rogerum in placitum de tenemento quod annotatur in rotulo præcedente. Et quod judicium fuit, quod Rogerus teneat in pace tenementum prædictum, sicut continetur in cyrographo facto inter ipsum & prædictum Matildam, & quod nullus prædictorum poterit eum implacitare, ex quod ipsi fuerunt in patria quando finis ille factus fuit, & non posuerunt clameum aliquod in terra illa, sicut prædictus Rogerus contra eos dixit in curia regis in placito, & ipsi hoc non defenderunt.*

Diff. p. 14.
15.

§ 4. The effect of a judgment or fine continued to be the same when *Bracton* wrote; and he justifies it upon the principle, that sufficient time was given both in a real action, and the passing a *chirographum* for all those who had any right to make their claim. *Et sciendum quod statim in ipso placito & factiōe cyrographi, vel ante judicium si presens fuerit in curia, vel si in patria vel in regno infra quatuor maria, nec aligare poterit ignorantiam, nisi justum intervenerit impedimentum, nec ulterius audiri debet (ut videtur) quia terminum habet ad minus unius mensis (secundum communem provisionem regni) infra quem venire potest commode post placitum*

Bract. 436.
a & b.

placitum motum, quocumque fuerit in regno, infra quatuor maria, quia quilibet implacitatus debet habere summonitionem 15 dierum ad minus, quæ rationabilis dici poterit summonitio, nec conceditur alicui cyrographum primo die litigii, sed habebit alium diem per spatium 15 dierum ad minus ad capiendum cyrographum suum, ut infra totum illud tempus possit qui jus habuerit opponere clameum suum.

§ 5. A considerable alteration was, however, made in this respect some time between the reign of *Hen. 3.* and that of *Ed. 1.* for in the time of this latter prince, all persons were allowed a year and a day to claim against a judgment or fine. Thus *Fleta* says,
 Lib. 6. c. 53. *Excipere enim poterit tenens ex taciturnitate petentis vel alicujus antecessoris sui, ut si subticuerint cum viderint de jure suo litigare, vel finalem concordiam facere & clameum suum infra annum & diem non apposuerint.*
 But if no claim was made within that period, it then became a perpetual bar to all persons whatever; so that a fine was a mode of acquiring lands, which, after a certain time, secured the title of the purchaser against every kind of claim.

2 Inst. 713. § 6. The necessity of some kind of assurance of this kind seems to have been very early felt; for it is a maxim of the highest antiquity in our law, that all sales of personal property in an open fair or market, are not only good and valid between the contracting parties, but are also binding on all strangers who have any right to the things thus sold: and Lord *Coke*, and the author of *Doctor and Student*, are of opinion

opinion that the validity of a sale in an open market, and its efficacy in binding the rights of strangers, was extended to a fine, for the security of those who were in possession of lands *.

§ 7. The utility of fines, and the propriety of allowing them the utmost force in securing landed property, produced the statute 18 Ed. 1. ft. 4. usually called the statute *de modo levandi fines*, which was made for the sole purpose of ascertaining the manner in which fines should in future be levied, and of declaring their effect. This statute, after regulating the forms which were to be pursued in the passing of fines, proceeds thus:—" And the cause wherefore such solemnity ought to be observed in levying a fine is, because a fine is so high a bar, and of so great a force, and of so strong a nature in itself, that it concludeth not only such as are parties and privies thereto, and their heirs, but all other persons in the world, being of full age, out of prison, good memory, and within the four seas, the day of the fine levied, if they make not their claim of their action within a year and a day, on the foot of the fine."

Of the Statute *De modo levandi Fines*. 18 Edw. 1.

2 Black. Rep. 994.

* The law hath ordained the Court of Common Pleas as a market overt for assurances of land by fine; so that he who will be assured of his land, not only against the seller, but all strangers, it is good for him to pass it in this market overt by fine. 3 Rep. 78 b. For as the common law hath provided a sure and safe way to acquire and get the property of goods by sale in market overt, so also the common law hath ordained a sure manner of conveyance for the purchaser of lands, which, as our statute saith, was by fine. Co. Read. 1.

§ 8. In

Rot. Parl. 19
Edw. I. N^o 1.
vol. I. p. 66.

§ 8. In the next year after this statute was made, there is a very strong instance of the same principle to be found in the Rolls of Parliament. The King having seized on the manor of *Sobbers*, for his year, day, and waste, on account of a felony committed by *Thomas de Weyland*, *Margery* the wife of the said *Thomas*, and *Richard* his son, petitioned the King to be immediately restored to the manor; because they had been enfeoffed jointly with the said *Thomas* for their lives, as well by a charter as by a fine levied in the King's Court, which they produced; and as *Thomas de Weyland* was only seized for life, they contended that the King was not entitled to the year, day, and waste, nor the lord of the fee to a forfeiture. This case was solemnly discussed in Parliament, where it was determined, that, in consequence of the fine, the manor was not forfeited; and in this judgment is the following remarkable passage: *Nec in regno isto provideatur, vel sit aliqua securitas, major, seu solemnior, per quam aliquis vel aliquid statum certiores habere possit, vel ad statum suum verificandum aliquod solemnius testimonium producere, quam finem in curia Domini regis levatum, qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, & hac de causa providebatur.*

2 Inst. 511.

§ 9. The principles of natural justice require, that those who are disabled from pursuing their rights should not be bound by their non-claim; and therefore all those who were under the age of twenty-one years, in prison, of non-sane memory, or beyond the four seas, when a fine was levied, were excused from making

Bract. 436 b.
2 Inst. 516.
Plowd. 360.

making their claim, both by the common law, and by this statute; and no particular time being prescribed to them for pursuing their rights, such persons as happened to labour under any of those disabilities when a fine was levied, were not obliged to make their claim within a year and day after the removal of their disabilities, but were allowed to prosecute their rights at any subsequent period.

§ 10. By the old law, married women were not bound to make any claim during their coverture, *Item excusatur uxor quæ sub potestate viri supposita quod clameum non apposuerit licet mittere possit.* But no saving or exception was made in this statute for married women, because their husbands were always supposed to be capable of claiming for them. However, if the husband were within age at the time when a fine was levied, although the wife was of full age, still the infancy of the husband, whose province it was to make the claim, saved the right of the wife for ever.

Braet. 436 b.
1 Inst. 260 b.
Plowd. 360.

§ 11. In case of a recovery in a writ of right, or fine executory, the recovery and fine must have been executed, and the possession delivered to the recoverer or cognizee, otherwise they were no bar whatever; because, until there was a transmutation of possession, strangers were not presumed to have any notice of the alteration of property, and therefore were not obliged to put in their claim. This rule gave rise to a great number of suits, by the maintenance of the nobility and great barons, during the insurrections and civil wars which happened in the reign of Hen. 3. Aver-

Of the Statute
*De finibus
levatis.*
Co. Read. 14.
2 Inst. 522.
Plowd. 359.

Co. Read. 18.
2 Inst. 522.
1 Reeves 450.

ments that there was no transmutation of possession were frequently made against fines, and were usually allowed in the two following cases; first, where a man seised in fee levied a fine to a stranger *sur cognizance de droit come ceo, &c.* and the cognizee granted and rendered back the same lands to the cognizor in tail, for life, or for years; and secondly, where a tenant in tail accepted of a fine from a person who had nothing in the lands.

§ 12. In these cases, the heirs of the cognizor, who were prejudiced by such fines, were allowed to avoid them by an averment that there was no transmutation of possession. To remedy this inconvenience a statute was made in the 27 *Edw. 1.* called the statute *de finibus levatis*, enacting, that such averments should not thenceforth be admitted.

This statute also directed, that the note of every fine should be read in the Court of Common Pleas in two certain days in the week, and that during such reading all pleas should cease.

Of the Statute
of Non-claim.

§ 13. By the common law, and also by the statute *de modo levandi fines*, all those who had any right to lands whereof a fine was levied, were obliged to make their claim within a year and a day, unless they laboured under some one of the disabilities specified in that act; and it was determined, that, in the case of tenant for life, remainder for life, remainder in fee, if the first tenant for life had aliened his estate, and the alienee had levied a fine, the remainder-man for life might.

Plowd, 357.
359. 1 Inst.
254. 262.
2 Inst. 54.

might enter and avoid the fine, both as to himself, and as to the remainder-man in fee: but if the person next in remainder neglected to enter within the year and day, not only he, but also the remainder-man in fee, were for ever barred, and a claim by the remainder-man within the year and day would not have saved his right, by which means the estates of remainder-men and reversioners were frequently barred by the neglect of the particular tenants.

§ 14. This was certainly a very great grievance, and was so severely felt, that, to remedy it, the statute of non-claim 34 Ed. 3. c. 16. was passed, enacting, “ That the plea of non-claim of fines, which from thenceforth should be levied, should not be taken nor holden for any bar in time to come.”

This statute was made in consequence of a petition from the Commons, which is published in the rolls of Parliament, 17 Edw. 3. N° 26. *Item que noncleyme des fines levees sur le rendre en temps a venir ne barre nul home de sa action.* To which the King answered, *Il plest au Roi q’ desore cest chose soit fait et q’ estatut ent soit fait p’ avis des grantz et autres de son conseil.* Rot. Parl. vol. 2. p. 142.

The efficacy of fines was entirely destroyed by this statute, and strangers were thereby allowed to claim lands at any indefinite period of time after a fine had been levied of them, which must have been productive of very great inconveniences.

§ 15. The statute of non-claim is still in force with respect to fines which are levied without proclamations ; and although such fines are no bar to the issue in tail, yet when levied by a tenant in tail in possession, they operate as a discontinuance, and of course put the remainder-men or reversioners to their formedon, which now, by the statute 21 *Jas. I. c. 16.* must be brought within twenty years after the right accrues, unless the person who has the right labours under any of the disabilities specified in that statute.

*Tit. 31. c. 2.
f. 10.*

TITLE XXXV.

FINE.

CHAP. IX.

*Of the Force and Effect of Fines by the Statutes 1 Rich. 3.
4 Hen. 7. and 32 Hen. 8. in barring Estates Tail.*

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| <p>§ 1. <i>Of the Statute 1 Rich. 3.</i>
 2. <i>Of the Statute 4 Hen. 7.</i>
 4. <i>Of the Statute 32 Hen. 8.</i>
 5. <i>Operation of these Statutes in
barring Estates Tail.</i>
 6. <i>Who are Privies within this
Statute.</i>
 21. <i>The Tenant in Tail need not
be in Possession.</i>
 31. <i>An Estate Tail in a Rent-
Charge is barrable.</i>
 32. <i>And in an Advowson.</i>
 33. <i>And in a Trust Estate.</i></p> | <p>§ 34. <i>A Fine bars the Issue in Tail
before Proclamations.</i>
 37. <i>Fines in inferior Courts no
bar to Issue in Tail.</i>
 39. <i>The Right to levy a Fine
cannot be restrained.</i>
 40. <i>A Fine does not bar Re-
mainders.</i>
 41. <i>But lets in the Reversion.</i>
 42. <i>Exceptions in the Statute
32 Hen. 8.</i>
 43. <i>Effect of the Warranty in a
Fine.</i></p> |
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Section 1.

IT has been a constant remark of those who have had occasion to trace the history of our *English* jurisprudence, that, whenever a material alteration was made in the common law, the inconveniencies arising from such change, have been much greater than those which were intended to be remedied.

*Of the Sta-
tute 1 Rich. 3*

This observation was, perhaps, more fully exemplified by the consequences which attended the statute of Non-claim, than by any other innovation which has

1 Inst. 518.

Bacon's Life
of Hen. 7.
p. 3.

been attempted in the common law. On this subject, it is difficult to add any thing to the force of Lord Coke's expression, "Great contentions arose, and few men were sure of their possessions." And it is astonishing that the Legislature should suffer a grievance which must have been so universally felt, to continue so long : for the common law respecting non-claim was not revived until the first year of the reign of *Rich. 3.* who seems to have attempted to palliate his cruelties, and the usurpation of the crown, by the many excellent laws which he immediately enacted ; one of those was the 1 *Rich. 3. c. 7.* by which the common law was restored, and the doctrine of non-claim revived.

Of the Statute 4 Hen. 7.

§ 2. This statute was soon followed by the 4 *Hen. 7. c. 24.* and as, in this last statute, all the clauses in the 1 *Rich. 3.* are copied almost *verbatim*, and some additional matters are subjoined, the statute 1 *Rich. 3.* is now become useless and obsolete, and the whole effect of fines depends almost entirely, at this day, on the 4 *Hen. 7.* for which reason, it will be necessary to explain it at large.

This act, after reciting the last clause in the statute *de finibus levatis*, proceeds thus : "The king our sovereign lord considereth that fines ought to be of the greatest strength to avoid strifes and debates, and to be a final end and conclusion ; and of such effect were taken afore a statute made of non-claim, and now is used the contrary, to the universal trouble of the king's subjects ; will therefore it be ordained," &c.

The first section which directs the proclamations to be made, has been already stated. Ch. 2. f. 59.

§ 3. *Sect. 2.* “ And the said proclamations so had
“ and made, the said fine to be a final end, and con-
“ clude, as well privies as strangers to the same, ex-
“ cept women covert, other than be parties to the said
“ fine, and every person then being within the age of
“ 21 years, in prison, or out of this realm, or not of
“ whole mind at the time of the said fine levied, not
“ parties to such fine.”

We have seen that, by the common law, a fine levied of an estate tail, only operated as a discontinuance of it, and did not bar the issue from bringing their formedon. But, in consequence of some ambiguous expressions in this statute, it was supposed to enable tenants in tail to bar their issue by a fine; estates tail, however, had continued so long, and were so much favoured by the nobility, on account of their not being forfeitable for treason, that the judges were extremely cautious of putting so extensive a construction on it, especially as the statute *de Donis Conditionalibus* expressly declares that a fine levied of an estate tail should be void.

A case, however, arose, in 19 *Hen. 8.* in which this point came in question before all the judges in *Serjeants' Inn*; a tenant in tail levied a fine, and the five years passed in his lifetime; he afterwards died, and the question was, whether his issue should be barred by the fine? *Englefield, Shelley, and Coningsby*, contend-

Bro. Ab. Tit.
Fine, pl. 1.
Dyer 3 a.
1 Inst. 121 a.
n. 1.

ed, that the issue was not barred, because he was neither privy nor party to the fine, for he claimed the land from the donor, and not from the donee, although he must convey himself to the land by the father. On the other side *Fitzjames, Brudenell, Fitzherbert, Brooke, and Moore*, were of opinion, that the issue was barred, for the intention of the makers of the statute was, that a fine should be a final end, and conclude as well privies as strangers; and that the third saving only extended to strangers, but not to privies.

Of the Statute 32 Hen. 8.

32 Hen. 8.
c. 36. f. 1.

§ 4. This determination of the Judges seems not to have been entirely approved of; for, in 32 *Hen. 8.* a statute was made, reciting, that doubts had arisen respecting the validity of the statute 4 *Hen. 7.* in barring the issue in tail; and enacting, “ That all and singular
“ fines, as well heretofore levied as hereafter to be
“ levied, with proclamations according to the statute,
“ by any person or persons of full age of one and
“ twenty years, of any manors, lands, tenements, or
“ hereditaments, before the time of the said fine levied, in anywise intailed to the person or persons so
“ levying the said fine, or to any of the ancestors of
“ the same person or persons in possession, reversion,
“ remainder, or in use, shall be, immediately after the
“ same fine levied, engrossed, and proclamations made,
“ adjudged, accepted, deemed and taken, to all intents and purposes, a sufficient bar and discharge for
“ ever against the said person and persons, and their
“ heirs, claiming the said lands, tenements, and hereditaments, or any parcel thereof, only by force
“ of such intail, and against all other persons claiming
“ the

“ the same or any parcel thereof, only to their use, or
 “ to the use of any manner of heir of the bodies of
 “ them, any ambiguity, doubt, or contrariety of opi-
 “ nion arisen or grown upon the said statute to the
 “ contrary notwithstanding.”

§ 5. The statute of 32 *Hen.* 8. having been pro-
 fessedly made for the purpose of explaining the statute
 4 *Hen.* 7. they must be considered as forming one law.
 The doctrine established by them is, that a fine with
 proclamations shall bar all privies and strangers; and,
 when levied of any manors, lands, tenements, or he-
 reditaments, intailed to the person levying such fine,
 or to any of his ancestors, shall bar the said persons
 and their heirs claiming by force of such intail.

Operation of
 these Statutes
 in barring
 Estates Tail.

§ 6. The term by which the issue in tail is described
 in the statute 4 *Hen.* 7. is that of privy, which has va-
 rious significations in law; it sometimes means that
 connection which arises between persons who have en-
 tered into a mutual contract with each other, as be-
 tween donor and donee, lessor and lessee; or else it
 signifies a relationship of blood, as between ancestor
 and heir. But, in consequence of the statute 32 *Hen.* 8.
 it has been determined, that, by the word privies, are
 meant those persons who are not only privies in blood
 to the persons who levy the fine, but also privies
 in estate and title to the land whereof the fine is levied,
 that is, those who must necessarily convey their descent
 through the cognizor before they can make out their
 title to the estate, which comprehends the issue in tail;
 and a person who is privy within the intention of the

Who are Pri-
 vies within
 this Statute.

1 Inst. 271 a.
 8 Rep. 42 b.

Shep. Tou.
21.

4 Hen. 7. is an heir in tail within the intention of the
32 Hen. 8. *et sic e converso*.

§ 7. Thus, if a tenant in tail in possession levies a fine with proclamations, it will be an effectual bar to all his issue ; for they are privy to him both in blood and estate, and can only make a title to the estate tail as his sons.

Dyer 351 b.

Beaumont's
Case,
9 Rep. 138.

§ 8. So, where husband and wife were tenants in special tail, and the husband alone levied a fine, it was determined in 18 Eliz. and also in 10 Ja. 1. that it was a good bar to all their issue ; for, in making out their title, they must necessarily shew themselves to be heirs to the father as well as to the mother ; and, therefore, they are privies both in blood and estate to the cognizor of the fine.

1 Inst. 372 a.

§ 9. Lord Coke says, that if lands were given to the elder son and the heirs of his body, remainder to his father and the heirs of his body, and, after the father's death, the eldest son had levied a fine with proclamations, and died without issue, the second son would have been barred by the fine ; because the remainder, which was limited to the father and the heirs of his body, having descended on the eldest son, the second son, in making out his title to this remainder, must convey his descent through his eldest brother, by which means, he would become a privy to him both in blood and estate.

§ 10. It has been stated in a former title, that a limitation to the heirs of the body of *A.*, provided *A.* be dead when the limitation takes effect, will vest in the person answering the description of such special heir; and, in case of his death without issue, will go to the person who would be entitled to such estate, if it had originally vested in the ancestor of the first taker. And that this devolution, after the decease and failure of issue of the first special heir of *A.*, to the other heirs equally falling within the same description, is *quasi* a descent *per formam doni*; from which, it follows, that if the first, or any other of the persons taking an estate in this manner, levies a fine of it, the estate tail will be barred, because all the persons taking under the original words are in by a species of descent, and are, therefore, privies to those who take before them.

Tit. 32. ch. 24.
f. 36.

§ 11. The privity must be both in blood and estate, for privity in blood only will not be sufficient; and, therefore, if lands be given to a man and the heirs females of his body, who has a son and a daughter, and the son levies a fine and dies without issue, it will be no bar to the daughter; for although she is privy in blood to her brother, yet she is not privy in estate or title to him, as she can make her title to the estate without conveying her descent through him, or even mentioning him.

Shep. T. 21.

§ 12. It follows, from the same principle, that if a tenant in tail has issue a daughter who levies a fine, and afterwards a son is born, he will not be barred by his sister's fine, because he can make his title to the

Hob. 333.

estate tail, as heir of the body of his father, without conveying his descent through his sister.

Jenk. 275.

§ 13. If a fine be levied to a stranger tenant in tail, and the tenant in tail grants and renders his estate to the stranger, such a fine will bar the issue in tail.

Smith v.
Stapleton,
Plowd. 430.

§ 14. As a tenant in tail may convey his whole estate by fine, so he may create any lesser estate out of it, which will likewise bind his issue after his death.

Shep. T. 26.

§ 15. If the issue in tail levies a fine in the life-time of his ancestor, who is then seised of the estate tail, the ancestor himself may afterwards levy a fine, and thereby bar his issue, and also the person to whom the issue levied the fine. So that, in all cases of this kind, it is understood, that the tenant in tail dies without barring the estate tail, by which means, it descends upon the issue.

2 Will. R.
220.

§ 16. A tenant in tail, being guilty of murder, levied a fine before conviction; and it was doubted, whether it should bar the issue for the lord's benefit. The court inclined to think it should; but no judgment was given.

7 Rep. 52 a.
Plowd. 227.

§ 17. Where the king is tenant in tail, he may, by a fine, levied on a grant and render, bar his estate tail; because, it being determined in *Lord Berkley's case*, that the king was bound by the statute *de donis*, it was but reasonable his Majesty should take advantage of those

those statutes, which enable tenants in tail to bar their estates.

§ 18. A fine *sur concessit* will bar an estate tail as long as it continues in force, and, therefore, any estate created by a fine of that kind, will be good against the issue in tail.

Earl of Rutland's Case, Cro. Jac. 40. Jenk. Cent. 321.

§ 19. Although a fine, levied by a tenant in tail, may be defeated by a person claiming some particular estate in the lands of which the fine is levied, yet it will still continue to be a good bar to the issue in tail.

§ 20. A tenant in tail discontinued in fee, afterwards disseised the discontinuee, and levied a fine with proclamations; the discontinuee entered on the land, and avoided the estate, which passed by the fine as to himself. The question was, whether the heir in tail was remitted or not: and the judges were unanimous that the heir in tail was not remitted, but was barred by the statute 32 Hen. 8., although the estate which passed by the fine was avoided. The same point was determined in the case of *Hunt v. King*, which will be stated in this chapter.

1 And. 43.
3 Rep. 91 a.
Com. Rep. 216.

§ 21. It is not necessary that a tenant in tail should be in the actual possession of the estate tail, in order to be capable of barring his issue by fine; for the statute 4 Hen. 7. has expressly excluded parties and privies to a fine from averring *quod partes finis nihil habuerunt*; and the statute 32 Hen. 8. makes a fine levied of any lands

The Tenant in Tail need not be in Possession.

lands intailed to the person so levying the same, or to any of his ancestors, a sufficient bar against such person and his heirs. A fine, therefore, with proclamations duly levied by the person who has the right of an intail in him, will be a good bar to his issue, although at the time when the fine was levied, he had never entered on the estate tail, or had only an estate tail in remainder, or had even made a feoffment, or any other conveyance of it.

Zouch v.
Bamfield,
3 Rep. 88.
1 Leon. 75.

§ 22. *Edward Lord Zouch* brought a formedon in the descender for a moiety of a manor against one *Bamfield*, who pleaded in bar that *John*, great-grandfather of the demandant, levied a fine *sur cognizance de droit come ceo*, with proclamations of the said moiety, which was granted and rendered by the same fine to the said *John* and his heirs, whose estates the tenant had. Lord *Zouch* replied, that at the time when the fine was levied, and at all times after, the said *Bamfield* was seised of the land in his demesne as of fee. And on solemn argument, it was determined by all the judges, that the demandant, being heir in tail to the person who levied the fine, could not aver the continuance of the land in a stranger, nor that *partes finis nihil habuerunt*, because the statutes 4 Hen. 7. and 32 Hen. 8. bound the estate tail, although the person who levied the fine was not then in possession of the estate tail, which, Lord *Coke* observes, was the first determination on this point.

§ 23. A fine levied by a tenant in tail in remainder, expectant on an estate for life, or an estate tail, will be

be a good bar to the issue of the person who levies the fine.

A. being tenant for life, remainder to *B.* in tail, reversion to *B.* and his heirs, *B.* levied a fine with proclamations of the estate tail, during the life of the tenant for life; and it was adjudged to be a good bar to the estate tail under the words of the statute 32 Hen. 8.

Case of Fines,
3 Rep. 84.
Jenk. 274.

§ 24. If a tenant in tail makes a feoffment of the estate tail, and afterwards levies a fine of it, his issue will be thereby barred.

3 Rep. 90 a.

William King, the grandfather, being tenant in tail, enfeoffed *Richard King*, the father, in fee; and, afterwards, *William King* disseised him, and levied a fine with proclamations to one *Hitchcock*. The father entered, and the cognizee of the fine entered on him: after the death of the grandfather and father, the son brought a formedon for the recovery of the land, to which this fine was pleaded in bar: the demandant pleaded the entry of his father, and judgment was given for him. A writ of error was brought, and error assigned in matter of law, that this fine was a good bar to the issue in tail by the statute 32 Hen. 8., for it was not to be compared to a fine at common law, nor to fines levied by other persons, because, in this case, it was sufficient that the fine was levied by the person who had the right of the estate tail in him, or to whom the land was inrailed, although none of the parties to the fine had any estate of freehold in possession,

Hunt v. King,
Cro. Eliz.
610.

Ante f. 22.

sion, remainder, or reversion, in the land whereof it was levied, as it was adjudged in the case of *Zouch v. Bamfield*. The court being of this opinion, the judgment was reversed.

3 Rep. 90 a.
Jenk. 275.

§ 25. Although a tenant in tail be disseised of the estate tail, yet, if during the disseisin, he levies a fine to a stranger, it will bar his issue, who will not be allowed to plead, that his ancestor was not seised of the estate tail when he levied the fine.

§ 26. In case of a lineal descent, the issue in tail may be barred by the fine of his ancestor, although, at the time of levying the fine, the ancestor had only a possibility of an estate tail, which never took effect, because the issue, in making his title, must convey his descent through such ancestor, which makes him a privy to him.

Archer's Case,
3 Rep. 90 a.
Hob. 333.

Lands were given to *A.* and his wife in special tail; *A.* died, leaving issue a son, who disseised his mother, and levied a fine with proclamations. It was resolved by all the judges, that this fine was a good bar to the issue of the son, although the son, at the time when he levied the fine, had only a possibility of an estate tail, his mother being then alive; for the statute 32 *Hen. 8.* ought to be expounded according to the letter of it, and as the land was intailed to the ancestor of the person who levied the fine, although such ancestor was alive, so that no estate or right had descended on the person who levied the fine which he could pass or extinguish, yet as the statute says, “ intailed to the per-
“ son

“ son so levying the same, or to any of his ancestors,” in the disjunctive, it was adjudged that the fine did bar the right which afterwards descended to him, not only as to himself, but also as to all his issue.

§ 27. This principle was carried much further in the following case :

William Grant devised his lands to *John Grant*, when he should attain the age of twenty-five years, to hold to him and the heirs of his body. *John Grant*, the devisee, after he had attained the age of 21 years, but before he was 25, levied a fine of the lands thus devised ; and the question was, whether it should bar his issue. It was resolved, that the estate tail was barred by this fine, although *John Grant*, when he levied it, had but a bare possibility of an estate tail. Lord Coke says, that no judgment was given : but *Croke* and *Leonard*, who have reported this case by the name of *Johnson* and *Bellamy*, say that judgment was given, that the estate tail was barred by the fine. And, in *Sir Thomas Raymond's Reports*, 149. it is said, that although the estate was not barred by the 4 *Hen.* 7. it was well barred by the 32 *Hen.* 8. in consequence of these words, “ All fines, levied by any person or persons, &c. of “ any manors, &c. before the time of the said fine “ levied in anywise intailed to the person or persons so “ levying the same fine, or to any of the ancestors of “ the same person or persons.”

Grant's Case
cited, 10 Rep.
50 a.

Cro. Eliz.
122.
2 Leon. 36.

§ 28. In the case of a collateral descent, a fine levied by a person who was never seised of the estate tail, and
on

on whom it never descended, but who had only a possibility of an estate tail, is no bar to a collateral heir in tail, of the person who levied the fine; because, in making his title to the estate tail, he need not convey himself through him, so that he is not a privy to him.

Mackwill-
liam's Case,
Hob. 332.
Sir W Jones,
31. S. C. by
the name of
Godfrey v.
Wade.

§ 29. A husband made a feoffment to the use of himself and his wife, and the heirs male of their two bodies, remainder to the heirs male of the body of the husband, remainder to the heirs of their two bodies, remainder in fee to the husband. The husband and wife had issue a son and a daughter, the husband died; the son made a lease to commence after the death of his mother, then levied a fine with proclamations to the use of himself in fee, and died without issue in the life-time of his mother. The question was, whether this lease was good against the daughter? It should previously be observed, that the estate tail limited to the husband and wife, and the heirs male of their bodies, vested wholly in the wife after the death of her husband, although she was within the statute 11 *Hen. 7. c. 20*, and the remainder to the heirs male of the body of the father was in the son at the time when he levied the fine; but these estates became extinct when the mother and son died, so that the lease in question could only be derived out of the remainder to the heirs of the bodies of the husband and wife, to which both the son and the daughter were inheritable. It was determined by Lord Chief Justice *Hobart*, *Hutton* and *Jones*, against the opinion of *Winch*, that although, in a lineal descent the issue in tail were barred by the fine of their ancestor,

ancestor, notwithstanding such ancestor had but a possibility of an estate tail when he levied the fine ; yet, in a collateral descent, the case was very different, as it was not necessary that the issue in tail should make mention of every collateral issue inheritable before him, as in a lineal one ; and that, in the present case, as the estate tail never descended on the son, his fine could be no bar to his sister, who was not privy to him, because she could make her title to the estate tail without conveying her descent through him, or even mentioning him in her pedigree. Judgment was therefore given, that the lease was void as to the sister ; but it was observed, that if the estate tail had descended on the son, his fine would then have barred his sister, because, in that case, she must have conveyed her descent through him, in order to make out her title to the estate tail, by which means, she would have been a privy to him.

§ 30. So, where an eldest son levied a fine of an estate tail, which was then vested in his mother, and died in the life-time of his mother, by which means the estate tail never descended on him. It was adjudged in the Common Pleas, by three judges against one, that this fine did not bar the second brother. And, upon a writ of error, all the judges of the King's Bench were of the same opinion, because, as the estate tail never vested in the elder brother, the younger brother was not a privy to him.

Bradstock v.
Scovell,
Cro.Car. 434.

§ 31. A tenant in tail of a rent-charge may bar it, by levying a fine of the lands out of which the rent issues.

Upon

An Estate
Tail in a
Rent-Charge
is barrable.

Heliot v.
Saunders,
Cro. Jac. 700.
1 Vez. 391.

Upon demurrer, the case was thus : A person who was tenant in tail of a rent-charge out of the manor of *Kingsbury*, granted by Sir *Ambrose Cave*, levied a fine of the manor to Sir *Ambrose Cave* and his heirs, and this fine was pleaded in bar of an avowry for this rent by the heir in tail. The fine was levied of the rent *per nomen manerii*, and an averment was made that the fine was levied by agreement of the parties with an intent to bar the rent. The defendant pleaded, non-comprised, which being demurred to, and argued several times, it was held by *Hobart* Chief Justice, and *Harvey*, that the rent was barred by the fine, because the fine being levied of the land, passed the rent inclusively, it being directed by the agreement of the parties.

And in an
Advowson,
Plowd. 435.
Watson 84.

§ 32. As a fine may be levied of an advowson in gross, so a tenant in tail of an advowson in gross may bar his issue by a fine levied of it according to the statute 4 *Hen. 7*. It is, however, said in *Plowden*, that if a tenant in tail of an advowson grants or renders to another by fine, the nomination of a clerk to the advowson, this will not bind the issue, because the right of nomination is a thing distinct from the advowson, and not intailed ; but modern writers have thought differently on this subject, on the principle, that the presentation and nomination are in effect the same thing, being the fruit and full profit of the patronage. But if a tenant in tail of an advowson grants by fine the nomination of a clerk to one and his heirs, so that when the church becomes void, the grantor and his heirs may nominate a clerk to the tenant in tail and his heirs,
and

and that he or they shall present the clerk so nominated to the ordinary; such a fine will not bind the issue in tail, because there the nomination and presentation are distinguished, so that the fine is not levied of the thing intailed.

§ 33. If a person is tenant in tail of a trust-estate and levies a fine of it, such fine will have as extensive an operation in barring his issue, as if he had been seised of the legal estate.

And in a Trust Estate. Vide ch. 10. l. 23.

§ 34. Although no fine is a bar to an estate-tail, but a fine with proclamations, levied pursuant to the statute 4 Hen. 7. yet as soon as a fine is levied, and before all the proclamations are past, it is a good bar to an estate-tail, provided the proclamations are duly made, and the issue in tail cannot save his right by entering before all the proclamations are made.

A Fine bars the Issue in Tail before Proclamations.

This point was formerly much doubted, and in the case of *Smith and Stapleton*, 15 Eliz. it was contended by the counsel, that in consequence of the words in the statute 4 Hen. 7. “And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers, &c.” And also the words in the statute 32 Hen. 8. “after the same fine levied, ingrossed, and proclamations made, &c.” A fine was no bar to the issue in tail, if the ancestor died before all the proclamations were made: and *Brooke* seems to have been of the same opinion; the contrary, however, was determined in the following case:

Plowd. 434.

Bro Ab. Tit. Fine, 109

Purflow's
Case, cited
3 Rep. 90.

§ 35. Sir *George Blount* being tenant in tail of several manors, and having issue a daughter, levied a fine and soon afterwards died. The daughter immediately brought a formedon for the recovery of the estate-tail, pending which, all the proclamations were made. It was unanimously determined, that the daughter was barred by this fine, although her ancestor died, and she commenced her action, before all the proclamations were made. Lord *Coke* makes four observations on this case.

1st, That although, after a fine is levied, a right to an estate-tail descends to the issue, yet as soon as the proclamations are made, the right which thus descended is barred by the fine.

2d, Although a formedon is brought and pursued, yet, if the proclamations are all afterwards duly made, the fine will then be a good bar.

3d, When tenant in tail levies a fine, and dies before all the proclamations are made, the issue in tail is not within any of the savings of the 4 *Hen.* 7. for if he were, then the bringing his formedon before all the proclamations were made, would avoid the fine.

4th, That the proclamations serve no other purpose but that of distinguishing a fine levied pursuant to the statute 4 *Hen.* 7. from a fine at common law.

Case of *Fines*,
3 Rep. 84.

§ 36. So where a tenant in tail levied a fine, and died before all the proclamations were made, leaving

a son, who was beyond sea, who returned after all the proclamations were made, and claimed the land. It was resolved by all the Judges, that although a right of entail descended to the son on the death of his father, in consequence of his dying before all the proclamations were made; yet, when all the proclamations passed, the right which descended to him was for ever barred, and the issue could not have saved it by any claim.

§ 37. We have seen that fines may be levied in courts of ancient demesne, and other inferior courts; but they have only the operation of fines at common law which is to create a discontinuance, when levied of an estate-tail, and do not bar the issue from bringing a formedon; for no fine unless it is levied with proclamations, pursuant to the statute 4 *Hen. 7.* has the effect of barring an estate-tail, without a particular custom.

Fines in inferior Courts do not Bar to Issue in Tail.

Com. Rep. 624.

§ 38. There is one species of estate-tail which is protected from the operation of the statutes 4 *Hen. 7.* and 32 *Hen. 8.* that is, an estate-tail given or procured to be given by the crown, as a reward of services, where the remainder or reversion is vested in the crown; of which notice will be taken in a subsequent chapter.

§ 39. The privilege of levying a fine pursuant to those statutes, is an incident so inseparably annexed to an estate tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature

The Right to levy a Fine cannot be restrained.
1 Inst. 223 b. note 1.
1 Vent. 321.
2 Vern. 233.

ture of the estate, and therefore void. But a tenant in tail may be restrained from levying a fine at common law, because that is a tortious act, and only operates as a discontinuance to the issue.

A Fine does not bar Remainders.

§ 40. Before we quit this subject it may be proper to observe, that the operation of a fine is merely to bar the estate tail, but not the remainders or reversion which depend upon it: for a fine levied by a tenant in tail in possession, only discontinues the estate tail, and gives the cognizee a base fee, that is, an estate to him and his heirs, as long as the tenant in tail has heirs of his body; but does not bar the rights of the persons in remainder or reversion.

But lets in the Reversion.
1 Show. 370.
4 Mod. 1.

§ 41. Where the tenant in tail has the immediate reversion in fee in himself, he may make a good title by fine only; for in that case the operation of the fine will be to merge the estate-tail, and bring the reversion in fee into immediate possession: it being determined that a fine takes away the protection given to estates-tail by the statute *de donis*, and they then, like all other particular estates, become subject to merger and extinguishment, when united with the absolute fee.

This method, however, of barring an estate-tail, is attended with one considerable inconvenience, which will be mentioned in a subsequent chapter.

Exceptions in the Statute
32 Hen. 8.

§ 42. There are two clauses in the statute 32 Hen. 8. c. 36. by which it is enacted, That it shall not extend

tend to any fine levied of any lordships, manors, &c. § 3 & 4. the owners whereof, by any express words contained in any special act of parliament made since the 4 Hen. 7. are restrained from alienation; nor to any manors, lands, tenements, &c. then in suit, demand, or variance in any of the King's courts, or whereof any charters, evidences, or muniments, were then in demand in the Court of Chancery, &c. but such fines should have the same force and effect as if that statute had not been made.

§ 43. A fine has also an operation on estates-tail, in consequence of the warranty which is always inserted in it. Now, it has been stated in a former Title, that a collateral warranty is not prohibited by the statute *de donis*; and in Mr. *Robinson's* book on *Gavelkind*, it is said to be a common mistake, that all collateral warranties are taken away by the statute 4 & 5 Ann. c 16. whereas that statute only makes void all warranties by tenants for life, and all collateral warranties made by any ancestor, not having an estate of inheritance in possession: so that if *A.* be tenant in tail, remainder to *B.* his next brother, which is a very common case, arising almost on every marriage-settlement, and *A.* being in possession levies a fine, with warranty from him and his heirs, and dies without issue; this is a collateral warranty, for *B.'s* title is by way of remainder, to which his elder brother is collateral, which shall bar notwithstanding the statute, though no assets descend.

Effect of the
Warranty in
a Fine,
Tit. 32. ch. 4.
f. 23.

p. 125. note.

Lit. f. 716.

TITLE XXXV,

FINE.

CHAP. X.

Of the Force and Effect of a Fine in barring particular Persons, Estates, and Interests.

- | | |
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| <p>§ 2. <i>Parties.</i>
 3. <i>Lay Corporations.</i>
 4. <i>Married Women.</i>
 23. <i>Trust Estates.</i>
 30. <i>Copyholds.</i>
 35. <i>Terms for Years.</i>
 41. <i>Estates held by Statute-Merchant, &c.</i>
 44. <i>Devises.</i></p> | <p>45. <i>Executors to whom Lands are given for Payment of Debts.</i>
 46. <i>A Title of Entry for a Condition broken.</i>
 51. <i>A Power appendant or in gross.</i>
 54. <i>But not a Power collateral to the Land.</i>
 56. <i>Writ of Error.</i></p> |
|--|--|

Section 1.

THE object of the statute 4 Hen. 7. was not confined to the enabling tenants in tail to bar their issue, it was also intended to secure those who were in possession of land against all dormant claims; the words of the statute being so extensive, that they comprehend almost all persons, and almost every kind of estate or interest in lands: and where a fine and non-claim is pleaded, a court of law will not enter into any discussion of the title until that be accounted for.

Driver v.
Lawrence,
2 Black. Rep.
1259.

Parties.

§ 2. All those who are parties to a fine are immediately barred, and have no time allowed them to claim;

claim, even though they labour under disabilities, except in the case of infancy.

§ 3. Lay corporations, who have an absolute estate in their possessions, and a power of alienation, may be barred by a fine and non-claim. Lay Corporations.

The cooks of *London*, who were incorporated by *Edward 4.* bargained and sold a part of their lands in fee; the bargainee entered, and levied a fine with proclamations, and five years passed. Afterwards the bargain and sale proved to be void, on account of a misnomer in the corporation; and it became a question, whether the corporation was bound by the fine and non-claim. It was determined that the corporation was barred by the fine, because the statute *4 Hen. 7.* was made for the public good, and to settle and quiet men's inheritances: that therefore the words of it ought to be construed in the most extensive sense, for the benefit of those who were in possession of lands, and for barring the rights of all persons who were remiss in making their claims: so that although the words of the statute only extended to natural persons and their heirs, and no mention was made of any corporation or successors, yet it was the intention of the legislature, that it should extend to such corporations as had in themselves an absolute estate and power of alienation. Croft v. Howell, Plowd. 536.

Ecclesiastical corporations, however, are not barred by a fine and non-claim, as will be shewn hereafter.

Married
Women.

§ 4. By the common law, a married woman could not, by joining with her husband in any deed or conveyance whatever, bar herself or those claiming under her, of any estate whereof she was seised in her own right, or of that portion of her husband's real property, which the law has provided for her support in case she survives him*.

This rule, probably, arose from that principle of law, that the legal existence of a woman is suspended during the marriage, or, at least, is incorporated or consolidated into that of her husband, or else from a fear that her husband should use any compulsion for the purpose of forcing his wife to part with her rights in his favour.

§ 5. But although a married woman was never bound by any deed or conveyance executed by her during the coverture, yet, if an action was brought against a husband and wife for the recovery of any lands, whether the property of the husband, or of the wife, and judgment was given against them, the wife was barred.

2 Inst. 342.

Thus, it appears, that, until the statute of *Westm. 2.* even a judgment by default in a possessory action against

* There are two instances in *Madox Formulæ Anglicanæ*, N^o 148. & 319. of feoffments, which are expressed to be made with the assent of the feoffor's wife. And Mr. Reeves (*Hist. of the English Law*, vol. i. p. 91.) supposes that the wife's claim of dower might, in those days, be barred by such assent, because feoffments were then made publicly in court.

a husband and wife, for the wife's freehold, was so far binding on her, that after her husband's death, she could only recover her estate, by bringing a writ of right. Now, a fine being an accommodation of a suit, and a concord being deemed to have the same force and effect as a judgment in a real action, it follows, that a married woman must have been as effectually bound by a fine as by a judgment in an adversary suit. Nor was it thought necessary to give the wife a power of claiming lands, whereof she and her husband had levied a fine, because, in that case, she must have assented to it; whereas the husband might have put in a feint plea, or let judgment go against him by default, without the consent or even knowledge of his wife.

§ 6. Mr. Hargrave, to whose learned note on fines I am indebted for the preceding observations, has very properly suggested, that the common notion of a fine's owing its effect in barring married women, to their secret examination by the judges or commissioners, is incorrect. This remark is fully confirmed by a passage in *Glanville*, from which, it appears, that a married woman might appoint her husband as her attorney to levy a fine for her*, in which case, it is highly improbable that she should have been examined: and from which, it may be concluded, that the private examination of a married woman was not a necessary

1 Inst. 121 a.
a. 1.

* "*Potest autem pater ita loco suo filium pro se ponere, et vice versa, extraneus quoque extraneum, uxor quoque maritum, cum quis itaque maritus possit loco uxoris sue in placito de maritagio, vel de dote ipsius uxoris per judicium sive per concordiam,*" &c. *Glanville*, lib. 2. c. 3. Vide also an authentic record, ante p. 80.

circumstance at common law, and was possibly first prescribed by the statute *de modo levandi fines*.

§ 7. If a fine derived its efficacy in barring married women, from the circumstance of their private examination, then that form might easily have been added to any other conveyance; but, by the common law, a bargain and sale by a husband, on which the wife is privately examined, does not bind her after the coverture is determined. It is, however, observable, that, by the custom of *London*, and several other cities, a married woman may bar herself by a deed inrolled, in which she is privately examined; and this custom was confirmed in the reign of *Hen. 8.* by a positive statute.

§ 8. But whatever were the principles upon which this doctrine was originally founded, it is now fully settled, that a married woman, by joining her husband in levying a fine, may bar herself and her heirs of all her estate and interest in any lands, whereof her husband is seised in her right, notwithstanding the stat. 32 *Hen. 8.* c. 28. And where a fine is levied by a husband and wife, of lands which are the property of the wife, the whole estate passes from the wife, and the cognizee is in by her only; so that, if the fine is afterwards reversed, the whole estate becomes again vested in the wife*.

* It is said *arguendo*, in *Mr. Douglas's Reports* " That a husband is only named in a fine of his wife's estate for conformity; " for the fine is considered as the act of the wife, not of the husband, and the cognizee is in by her only; inasmuch, that if a wife levies a fine without the concurrence of her husband, and he does not enter during the coverture, it will bar her after his death." *Doug.* 44.

§ 9. Where a fine is levied by a husband and wife, of lands which are the estate of the wife, the warranty should be from the husband and wife, and the heirs of the wife.

Roll. Ab. Tit.
Fine, (O. 3.)

§ 10. A husband and wife joined in exchanging lands which were the estate of the wife, with a stranger for other lands, and the exchange was executed. The husband and wife aliened the lands taken in exchange, and levied a fine of them to the alienee. It was adjudged, that the wife might enter on her own lands after the death of her husband, and that her joining in a fine of the lands taken in exchange, did not bar her from electing whether she should claim her own lands, or those taken in exchange.

Anon. 1 Leon.
285.

§ 11. A married woman may bind herself by a warranty in a fine *sur concessit*, and an action of covenant will lie against her upon such a warranty. Thus, where a husband and wife levied a fine *sur concessit* to A. for 99 years if he should so long live, with a general warranty against all persons during the said term; the husband died, and it was determined, that an action of covenant would lie against the wife upon the warranty.

Wotton v.
Hale,
1 Mod. 290.
2 Saund. 180.

§ 12. As a married woman may, by joining her husband in a fine, make an absolute alienation of her estate, so she may also make a conditional one; and, therefore, if she and her husband mortgage her estate in this manner, it will bind her and her heirs,

Reason v.
Sacheverell,
1 Vern. 41.

Glanv. l. 11.
c. 3.
10 Rep. 49 b.

§ 13. It was formerly held that a married woman did not bar herself of her right to dower, by joining her husband in a fine; because, until the death of the husband, the wife had no right of action: but the law is now entirely altered in this respect, as it has been long established, that if a husband and wife join in levying a fine of the husband's estate, the wife is thereby barred from claiming her dower, out of the lands which are comprised in the fine; because she having nothing in those lands in her own right, her joining her husband in a fine of them, could be for no other purpose than that of barring her from claiming dower; but a fine levied by the husband alone does not bar his wife of dower.

Tit. 10. ch. 4.
f. 17.

10 Rep. 49 b.

§ 14. Where a wife joins with her husband in levying a fine of lands, whereof her husband is seised in fee without any declaration of uses, the use results to the husband, and a new right to dower accrues to her. Thus it is laid down in *Lampet's case*, that if a husband and wife grant a rent by fine, or make a lease for years, rendering rent to the husband and his heirs, and afterwards the wife recovers dower, she shall hold it, charged with the rent, and with the term. In this case the wife, though she joined her husband in a fine was held dowable, subject only to the charges created by the fine, she must therefore have been entitled to dower out of the estate that resulted; for the uses of the fine being declared to be, to create a rent, or a term of years, the residue of the use resulted to the husband, and the widow became dowable of that residue.

§ 15. In a subsequent case it was held, that where husband and wife joined in a fine, and the husband alone declared the uses of it, the wife was concluded of her right to dower, because no contradiction of the wife appeared that she did not agree to the uses declared by the husband alone.

Haverington's Case,
Ow. 6.

Tit. 32. c. 14.
f. 26.

It follows from this case, that a fine levied by husband and wife without any declaration of uses by either of them, would not bar the wife from claiming her dower. For although a fine will bar a widow from claiming dower against any person deriving under a sufficient declaration of the uses of such fine, yet a fine will not have that effect in favour of the heir claiming by descent from the husband, for he must admit that his ancestor died seised, which will give the widow a title to dower.

§ 16. A woman may also bar herself of her jointure, by joining her husband in levying a fine of it, provided it be made pursuant to the statute 27 Hen. 8. and be a good bar of dower; because the wife by accepting such a jointure before marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death but her jointure, which she herself concurred in destroying by the fine. But if a jointure be settled on a woman after marriage (in which case it is no bar of dower) and she joins her husband in levying a fine of it, this will not prevent her from claiming dower out of any other lands whereof her husband was seised during the coverture, because the jointure being no bar of dower, the wife

1 Inst. 36 b.

Tit. 7. ch. 1.
f. 25.

1 Inst 36 b.
1 Bull. 173.
1 Leon. 285.
Dyer 358.
pl. 49.

had

had her election on her husband's death, either to accept of the jointure, or to claim her dower, and therefore Lord *Coke* says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

§ 17. Notwithstanding these determinations, if it appears not to have been the intention of a husband and wife in levying a fine to bar the wife's jointure, it will not affect it in a Court of Equity.

Solly v.
Whitfield,
Rep. Temp.
Finch. 227.

§ 18. Thus, where *A.* upon his marriage, in consideration of 500 *l.* portion, settled an annuity of 50 *l.* on his wife to be issuing out of particular lands; and afterwards *A.* and his wife joined in levying a fine of those lands to a mortgagee, who had notice of the annuity, which was excepted in the mortgage. It was contended that the wife had by this means extinguished her right to the annuity. But it appearing that it was not the intention of the parties to destroy this annuity, the court decreed that it should not be affected by the fine.

S. P. Naylor
v. Baldwin,
Rep. in Cba.
8vo. v. 1. 131.

Anon.
Skinner 238.
Brind v.
Brind,
1 Vern. 213.

§ 19. So where a jointure was settled on a woman, issuing out of some houses in *London* which were burnt down; the woman joined her husband in a fine of the houses, to create a long term for raising money to rebuild them; and it was agreed that the woman should have her jointure out of the reserved rent of the houses. Adjudged that the fine did not affect this jointure.

§ 20. However, where a married woman joins her husband in a fine, it will not only bar her from claiming dower out of the lands comprised in the fine, but will also bar her of any particular interest in those lands.

§ 21. A man on his marriage entered into a bond for 600*l.* to a trustee with a warrant of attorney to confess judgment thereon, to be defeazanced on the payment of 300*l.* to his wife if she should survive him: the wife afterwards joined her husband in a fine of all his lands. It was agreed that the fine not only barred the wife from claiming dower out of the lands, but also destroyed her interest in the judgment.

Goodrick v.
Shotbolt,
Prec. in Cha.
333.
Gilb. Rep.
18.

§ 22. Every kind of fine with or without proclamations, and whether levied in the Court of Common Pleas or in an inferior court, will bar a married women; for fines derive this effect from the principles of the common law, and not from any statute.

§ 23. A fine is a good bar to a trust estate, as well as to a legal estate, because the *cestui que trust* has an equitable interest, and is therefore bound to pursue the proper remedies for securing it: and if this were not the case, the operation of a fine would be much less extensive than it is, as there are so many trust estates now always existing. Thus, if *A.* is seised of the lands in trust for *B.* and *C.* enters on these lands and levies a fine of them with proclamations; if five years pass without any claim being made, this fine will

Trust
Estates.
Clifford v.
Ashley,
1 Cha. Ca.
268.
Salisbury v.
Bagot,
1 Cha. Ca.
278.
1 Freem. 311.

be

be a good bar both to *A.* who had the legal estate, and to *B.* who was the *cestui que trust*.

§ 24. But with respect to equitable titles there is a distinction; for where the equity charges the lands only, a fine and non-claim is a good bar, but where it charges the person only in respect of the land, it is then no bar.

Gilb. Cha. 62.

§ 25. Thus, if a trustee levies a fine of the lands whereof he is seised in trust, to a person who has notice of the trust, or if a man purchases from a trustee, with notice, and levies a fine, the *cestui que trust* will not be barred, because the fine being levied to a person or by a person who has notice of the trust, the land will continue subject to the trust, and therefore the Court of Chancery will not permit the fine to be a bar; so that whenever a person is charged as claiming under a trustee, he must either set up an opposite title, and deny his claiming under the trustee, or else, if he does claim under a trustee, he must set forth that he paid a valuable consideration for the lands, and deny that he had any notice of the trust.

2 Atk. 631.

§ 26. If the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee for the person who had the right, because (as Lord *Hardwicke* observes) this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine's being

being levied. It should however be observed, that where a fine is levied by a trustee or a person who has notice of the trust, it is not void, nor is it set aside, but the person to whom the fine was levied without consideration, or with notice, becomes himself a trustee *Infra, ch. 14* for the real owner.

§ 27. Having examined in what cases a *cestui que trust* may be barred of his trust estate by the fine of a stranger, it will also be necessary to enquire how far a fine levied by a *cestui que trust* himself, is a bar of his trust estate.

§ 28. Before the statute of uses, if a *cestui que use* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees. But modern Chancellors have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust*, shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. So that now a *cestui que trust* in tail may by a fine duly levied bar his issue as fully as if he had the legal estate: for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from executing the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities.

Year Book.
27 Hen. 8. 20;
Bro. Ab. Tit.
Fine, pl. 4.

1 Cha. Ca.
213.
Cases temp.
Talbot 43.

Basket v.

Peirce,

1 Vern. 226.

2 Ab. Eq. 473.

§ 29. A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute.

Copyholds.

§ 30. We have seen that a copyholder cannot implead or be impleaded for his copyhold in the King's Courts, and therefore cannot levy a fine of it in the Court of Common Pleas: but notwithstanding this principle, a copyhold estate is considered as an interest within the statute 4 Hen. 7. and therefore may be barred by a fine, levied by the person who has the freehold of the land.

Co. Cop. f. 55.

§ 31. Thus, if a copyholder be disseised, and the disseisor levies a fine with proclamations, both the lord of the manor and the copyholder will be barred, if they do not make their claim in due time. So if a copyholder makes a feoffment in fee, and the feoffee levies a fine with proclamations, and five years pass without any claim, the lord of the manor will be barred.

Margaret
Prodger's
Case,

10 Rep. 104.

§ 32. There is a custom in most manors that a copyhold may be entailed, but even if a fine were allowed to be levied in the court of the manor whereof such copyhold is held, it will not bar such an intail, because it is not levied pursuant to the statute 4 Hen. 7. unless it is allowed by the custom to have that effect.

Fit. 37. c. 2.

§ 33. Terms for years may be barred by a fine and non-claim, if the lessees were or ever might have been in possession.

Terms for
Years.

§ 34. Thus where a lease for years was made of certain lands, to begin after the determination of a lease then subsisting; the first term expired, the second lessee neglected to enter, and the person in reversion entered, made a feoffment, and levied a fine with proclamations of the lands. Five years passed without any claim being made by the second lessee, and the question was, whether he was barred by the fine. It was resolved, that although a lessee for years had not himself such an estate as would enable him to levy a fine, yet it did not therefore follow that his interest should not be barred by a fine; that a term for years was within the statute 4 Hen. 7. being comprehended under the word *interest*, and as the object of that act was to prevent strifes and debates, it would not have that effect, if its operation did not extend to long terms for years, which are now so common.

Saffyn's Case,
5 Rep. 123.
Cro. Jac. 60.

§ 35. This principle was carried so far, that where a person who had a long term for years, assigned it over to a trustee in trust for himself, then purchased the freehold and inheritance of the lands, and levied a fine: it was resolved that the term was barred, the assignee of it having suffered five years to pass without making any claim. Mr. Justice *Ventris* has taken notice of this case, and observed, that the cognizee of the fine, who was also the purchaser of the freehold, did not know of the term, or that it was held in trust

Ifcham v.,
Morrice,
Cro. Car. 109.

2 Vent. 329.

for him; so that if the fine had not barred it, he would have been cheated. But that where a term is assigned in trust for the person who is seised of the inheritance, and who is in possession, a fine levied by him will not destroy the term, because the owner of the inheritance is, in cases of that kind, tenant at will to his trustee; and this rule has ever since been adhered to: so that it is now a settled principle, that terms for years, which are kept on foot by purchasers, for the purpose of protecting the inheritance, are not barred by a fine, otherwise fines would frequently weaken the interest of purchasers, instead of adding to their security.

1 Lev. 272.
1 Vent. 82.
Sid. 465.
3 Keb. 564.
Duke of Norfolk's Case,
3 Ch. Ca. 1.

§ 36. A term which is vested in trustees on any particular trust (except that of protecting the inheritance) may also be barred by a fine and non-claim.

Hammer v.
Eyton,
Comb. 67.
1 Cha. Rep.
27. 33.

Thus, where *A.* had a term for years vested in him for securing children's portions, *B.* being in possession, levied a fine, and five years passed without any claim being made. It was resolved by the Court of King's Bench, that, admitting the term was in trust, it was barred by the fine.

§ 37. If a person makes a lease for years, and still continues in possession, he is considered as tenant at will to the lessee for years, and if the lessor being thus in possession, levies a fine, it will be no bar to the term for years, because the possession of the tenant at will being the possession of the person in remainder, his interest is not divested; and it will be shown in a subsequent part

part of this work, that no estate is barred by a fine, Ch. 13. unless it be devested out of the real owner.

§ 38. Thus, where a person who was seised in fee, for the continuance of his estate in his name and family, made a lease for 500 years in trust that he himself should receive the profits during his life, and that afterwards his brother should receive them. Some time after the lessor being in possession according to the trust, covenanted with other trustees for the same considerations, to stand seised of those lands to the use of himself for life, remainder to the use of his brother, &c. And that the said lease, and all other estates made or to be made by him, should be and enure to the same uses, and then levied a fine. A question arose, whether the term for 500 years was barred by the fine and non-claim. Sir *Matthew Hale* observed, that nothing had been done in this case whereby the estate of the lessee was devested or displaced; for the lessor continuing in possession, by permission of the lessees, as must be presumed, he was only tenant at will to the lessees, and therefore his fine had no operation; besides there was a privity between the lessor and lessee, which prevented the fine from operating as a bar to the term. No judgment appears to have been given in this case; but in another which was exactly similar, it was determined that a fine was no bar to a term of this kind.

Focus v. Salisbury.
Hard. 400.

Corbet v. Stone, Sir T. Raym. 140.

§ 39. If a person who has made a lease to trustees, and has still continued in possession, makes another lease of the same lands, and levies a fine to confirm

it, the first lease will be divested by the second ; so that it will then be barred by the fine and non-claim.

Freeman v.
Barnes,
1 Vent. 55.
1 Lev. p. 1.
270.

§ 40. The Marquis of *Winchester* made a lease for a hundred years, in trust to attend the inheritance, and the lessee entered. The Marquis afterwards made a lease for fifty-four years, and, to confirm it, levied a fine with proclamations. The lessee for fifty-four years entered ; and the lessee for a hundred years being out of possession, assigned his term to the plaintiff. The question was, whether the fine and non-claim barred the term of a hundred years ? It was adjudged that the Marquis, when he entered after he had made the lease for a hundred years, was tenant at will ; but that he had divested that term by making the subsequent lease for fifty-four years ; for it was in the power of the Marquis either to divest the term of a hundred years or not, and he had made his election by levying the fine ; so that the term for a hundred years, being thus divested by the lease for fifty-four years, was barred by the fine. But in this case all the judges agreed, that terms for years, kept on foot by purchasers to protect their estates, should not be barred by a fine and non-claim.

Estates held
by Statute
Merchant,
&c.
2 Inst. 517.
5 Rep. 124.

§ 41. Estates held by statute merchant, statute staple, and elegit, are comprehended within the statute 4 *Hen. 7.* and may therefore be barred by a fine and non-claim, provided the lands be extended.

Ognell v.
Lord Arling-
ton, 1 Mod.
217.

§ 42. Thus, upon a trial at bar, the court delivered it as law to the jury, that where lands were actually extended

extended on a writ of elegit, the tenant by elegit might be barred by a fine and non-claim; and that if an inquisition upon an elegit be found, the party has the possession before entry, and may bring an ejectment, or action of trespass.

§ 43. So in the case of *Deighton v. Grenville*, which will be stated in the next chapter, all the judges agreed, that although the cognizees of statutes merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry, and therefore they might be barred by a fine.

§ 44. The estate of a devisee may be barred by a fine and non-claim, if the devisee has not entered. Devisees.

Thus where *John Metcalf* devised lands to *John Gallant*, an infant of the age of three years, in fee. The son and heir of *John Metcalf* entered on the lands, and levied a fine of them. *John Gallant* the infant died before he attained his full age, leaving a sister, who was then married. The court were of opinion that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her.

Hulm v. Heylock,
Cro. Car. 200.

§ 45. Executors to whom lands are devised for payment of debts, may also be barred by a fine levied of the lands thus devised, if they do not make their claim in due time.

Executors to whom Lands are given for Payment of Debts.
5 Rep. 124 a.

A Title of
Entry for a
Condition
broken.

§ 46. A title of entry for a condition broken, may be barred by a fine levied by the grantee or devisee of the conditional estate.

Mayor of
London v.
Alsford, Cro.
Car. 575.
1 W. Jones,
452.

§ 47. Thus, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a school-master, &c. and, on non-performance of the trusts, the lands were devised over to other persons. The trustees neglected to perform the trusts, and levied a fine of the lands. It was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

Shep. Tou.
154.

§ 48. A title of entry for a condition broken may also be barred by a fine levied by the grantor of the conditional estate; as if a person makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee or to any other person, the condition will be thereby discharged for ever. But if the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and conveyance will be construed together, and will operate as one assurance.

Cromwell's
Case,
2 Rep. 69.

§ 49. It seems that a right or title of entry on any other account may also be barred by a fine.

Thomas v.
Mackworth,
Carter 75.

§ 50. Thus, where *Humphrey Mackworth* was seised to him and his heirs, provided that if 100 l. was not paid

paid within three months after the birth of a child, the trustees should enter. The money was not paid; so that the estate of *Humphrey* being with a *quousque*, ceased, but the trustees did not enter. *Humphrey* conveyed away the lands by lease and release, and levied a fine; after which five years passed. Lord Chief Justice *Bridgeman* delivered the opinion of the court, that the entry of the trustees was barred by the fine,

§ 51. A power appendant, or in gross, may be barred by a fine levied of the lands to which the power relates, by the person to whom such power is reserved; because by the fine, the person acknowledges all his right and interest in the lands to be vested in another; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over those lands. Besides a power appendant or in gross, being part of the old dominion, is considered as an interest which may be released,

A Power appendant, or in gross.
1 Inst. 237 a.
3 Rep. 83 a.

Christopher Digges being seised in fee, covenanted to stand seised to the use of himself for life, remainder over, reserving to himself a power of revocation, by deed indented and inrolled. *Christopher Digges* revoked the uses, but, before the deed of revocation was inrolled, he levied a fine. It was resolved that the fine being levied before the inrollment of the deed of revocation, until which time the revocation is imperfect, had destroyed the power.

Digges's Case.
1 Rep. 170.

1 Inst. 215 a.
Shep. T. 501.

§ 52. A power of revocation may also be destroyed in part, by levying a fine of part of the land, and yet the power will continue good as to the residue.

§ 53. If a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will in that case be considered as one assurance, and will not destroy the power.

Herring v.
Brown,
2 Show. 185.
1 Vent. 368.
Carth. 22.
Comb. 11.
Skin. 184.
1 Freem. 486.

Sir *J. Williams* being seised in fee, made a voluntary settlement to the use of himself for life, remainder to his brother Sir *M. Williams* in tail, reserving to himself a power of revocation. Some time afterwards, Sir *J. Williams* levied a fine, and by a deed made between him, his brother Sir *M. Williams* and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the said fine, the agreement of all the parties to the deed was, that it should enure to the use of Sir *J. Williams* and his heirs. It was objected that Sir *J. Williams* by levying this fine, without any precedent declaration of the uses to which it should enure, had destroyed his power of revocation, and forfeited his estate for life; for the deed being subsequent to the fine, was ineffectual, because there was an intermediate time between the levying of the fine and the execution of the deed, in which the forfeiture attached, and the power was destroyed; so that no subsequent act could purge the forfeiture which once attached, nor revive the power which was destroyed; for these reasons, and upon the authority

authority of *Digges's* case, it was adjudged in the Court of King's Bench, that Sir *J. Williams* had, by levying the fine, destroyed his power of revocation, and therefore that the subsequent declaration of uses was void.

On a writ of error to the Exchequer Chamber, this judgment was reversed by the opinion of six Judges against two; it being determined that the fine and declaration of uses were to be considered as one and the same conveyance, and operated as an execution, and not as an extinguishment of the power. It was agreed that a fine alone, without a deed to declare the uses of it, would have extinguished the power, but that it was otherwise where there was a deed declaring what the intention of the parties was when the fine was levied; and although the date of the deed was subsequent to that of the fine, (for no other reason, perhaps, but because the fine was levied in the vacation, and was dated as of the preceding term), still it was possible that the deed was executed at the time the fine was acknowledged; so that it would be unreasonable to make a forfeiture or extinguishment of a right merely by relation, which is but a fiction of law.

This doctrine has been confirmed by the Court of King's Bench, in the case of *Doe*, on the demise of *Odiarne v. Whitehead*, which will be stated in a subsequent chapter: so that now whenever a fine is levied, and a declaration of the uses of it is afterwards executed, the fine and declaration of uses will be considered as one assurance.

Douglas 45.
S. P.

But not a
Power colla-
teral to the
Lands.
1 Inst. 237 a.

§ 54. A power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine, levied by the person to whom such a power is reserved; because it is considered but as a bare and naked authority, which cannot be released or devested.

1 Rep. 174 a.

Thus, it is said by Lord Chief Justice *Popham*, in *Digges's* case, that if a feoffment was made to *A.* in fee to divers uses, with a proviso that it should be lawful for *B.* to revoke those uses; *B.* could not in that case revoke his power, nor extinguish or destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

§ 55. It follows from the same principles that a collateral power cannot be barred by the fine of a stranger.

Willis v.
Shorrall,
1 Atk. 474.

Thus where a person by a proviso in his marriage-settlement, gave his wife a power to dispose of 100 *l.* to such persons as she should appoint, to be paid within one year after his decease; and in default of payment, one *John Moreton* was empowered to make a lease of certain lands to raise that sum; the wife, in a year after the death of her husband, made an appointment of the 100 *l.* but it was not paid; the heir of the husband levied a fine of the land, and five years passed, and afterwards the appointees of the 100 *l.* brought their bill to be paid that sum.

Lord *Hardwicke* observed, that though by the several statutes relating to fines, all right, claim, and interest, which strangers had, were barred by a fine, yet that such a stranger as *John Moreton*, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

§ 56. A fine and non-claim is a good bar to a writ of error, in consequence of the word *actions* in the second saving of the stat. 4 *Hen.* 7. and a fine is also a good bar to a writ of error to reverse a common recovery.

Writ of Error:
Bartholomew
v. Belfield,
Cro. Jac. 332.

TITLE XXXV.

F I N E.

CHAP. XI.

*Of the different Savings in the Statute 4 Hen. 7. and the
Exceptions in favour of Infancy, Coverture, &c.*

- § 1. *Of the First Saving.*
 3. *Of the Second Saving.*
 17. *Of Persons having different
Rights.*

- § 29. *Of the Exceptions in favour
of Infancy, &c.*
 40. *Case of Persons dying under
their Disabilities.*

Section 1.

Of the First
Saving.

THE great inconveniencies which arose from the statute of non-claim, were removed by the statute 4 Hen. 7., and a proper medium was established between the unbounded latitude given by the former of those statutes, and the rigour of the common law; for the doctrine of non-claim was restored, but the time allowed for making the claim was extended from one to five years.

4 Hen. 7.
c. 24. f. 3.

The words of this clause, which is called the first saving, are, “ and saving to every person and persons, “ and to their heirs, other than the parties to the said “ fine, such right, title, claim, and interest, as they “ have to or in the said lands, tenements, or heredita- “ ments, at the time of such fine engrossed, so that “ they pursue their title, claim, or interest, by way of “ action

“ action or lawful entry within five years next after the
“ same proclamations had and made.”

§ 2. In consequence of this clause, it follows, that all those who have any present right or claim to lands whereof a fine is levied, are allowed five years, to be counted from the day on which the last proclamation was made to make their claim, and although there be no transmutation of possession, and the cognizor be in of the old use, yet, after five years, it will operate as a bar to all claims whatever. If, therefore, a tenant in tail is disseised, and the disseisor levies a fine with proclamations, the tenant in tail having a present right, may defeat the fine at any time within five years after the last proclamation has been made. But if he neglects to make his claim within that time, he will be for ever barred by the fine; and if the tenant in tail dies before the five years are expired, his issue will not be allowed a new period of five years to make his claim, but only so much of the five years as was not passed in the life-time of his ancestor. With respect to the mode of avoiding a fine within the term prescribed by the statute, it will be pointed out in a subsequent chapter.

Shep. Tou.
30.

2 Will. Rep.
19.

Shep. T. 30.
3 Rep. 87 b.

Ch. 14.

§ 3. By the common law, persons in remainder and reversion were frequently barred by the neglect of the particular tenant to make a claim within a year and a day after the fine was levied; and this is commonly assigned as the only reason for making the statute of non-claim; but cases of this kind are particularly provided for by the following clause in the statute 4 Hen. 7.

Of the Second Saving,

4 Hen. 7.
c. 24. f. 4.

which is usually called the second saving: “ And also
“ saving to all other persons such action, right, title,
“ claim, and interest in or to the said lands, tenements,
“ or other hereditaments as shall first grow, remain,
“ or descend, or come to them, after the said fine en-
“ grafted and proclamations made, by force of any
“ gift in tail, or by any other cause or matter had and
“ made before the said fine levied, so that they take
“ their action, or pursue their said right and title ac-
“ cording to law, within five years next after such
“ action, right, claim, title, or interest to them ac-
“ crued, descended, fallen, or come.”

§ 4. In consequence of this clause, all those to whom a right first accrues, at any time after a fine has been levied, are allowed five years, to be computed from the day on which their right first accrued to make their claim.

3 Rep. 87 a.
& b.
Plowd. 374.

§ 5. Thus, if a tenant in tail makes a feoffment, and the feoffee levies a fine, the issue in tail is within the second saving, and shall have five years from the death of his father to make his claim and avoid the fine; because he is the first to whom a right accrued and descended after the fine was levied, for his father could not enter against his own feoffment.

Penyfton v.
Lyfter,
Cro. Eliz.
896.

§ 6. In the same manner, if a tenant in tail bargains and sells his estate tail to a stranger in fee, who levies a fine of it with proclamations, the issue in tail is within the second saving, because the right first accrued to
him,

him, as his father could not enter against his own bargain and sale,

§ 7. No person, however, is within the second saving, but he to whom the right of avoiding the fine first accrued; so that those who claim under the person to whom such right accrued, are only allowed so much of the five years as have not elapsed in the life-time of their ancestor.

§ 8. Thus, it is laid down by *Dyer* and *Gatline*, that if a tenant in tail be disseised, and the disseisor levies a fine, the right of reversing the fine first accrues to, and attaches in the tenant in tail himself, so that, if he lets five years pass without impeaching the fine, and then dies, his issue will be for ever barred, for they are not within the second saving, because the right first accrued to their ancestor, and not to them. The Justices, *Southcote* and *Weston*, dissented from this opinion; and contended, that every issue in tail should have five years, as a new right came to every one of them *per formam doni*; which right, as they took it, the makers of the act intended to preserve, and to this purpose the words, by force of any gift in tail, were put in the second saving. But this opinion was utterly disallowed by the said Chief Justices, who said that the word *first*, which ought to be added to the word *descend*, and then it would be, *shall first descend*, will not suffer every descent to have five years.

Plowd. 374.
3 Rep. 87 b.
Cro. Eliz.
896.

9. If a tenant in tail, either of a legal or a trust estate, levies a fine, and five years pass, and afterwards the

Plowd. 374.
T. Raym.
151.

tenant in tail dies without issue, the persons in remainder or reversion are within the second saving, and have therefore five years to make their claim, from the death of the tenant in tail without issue, because their right did not accrue until the determination of the estate tail.

Shep. T. 33.

§ 10. If a tenant in tail discontinues his estate, reserving a rent, and dies, and the issue in tail accepts of rent from the discontinuee, who afterwards levies a fine with proclamations, the acceptance of the rent by the issue in tail bars him from claiming the estate tail; but, upon the death of the issue in tail, his issue will have five years to avoid the fine, in consequence of the second saving, because he was the first person to whom the right of reversing the fine accrued.

Ante ch. 5.
§. 38.

§ 11. In consequence of the statute 32 Hen. 8. c. 28. which has been stated in a former chapter, a fine levied by a husband alone, of any lands which are the freehold and inheritance of the wife, shall not make any discontinuance, or be prejudicial to the wife or her heirs, but she or they may enter on the lands and defeat such a fine. Although the words of this act are very general, yet, if the husband levies a fine with proclamations, and five years pass after his death, without any entry or claim by the wife, she will not only be barred of her entry, but also of her right; for the object of the statute was only to provide against the discontinuance, which was a grievance peculiar to married women, but not to invalidate fines duly levied, as to married women, they having a remedy in common with others by entry or claim to avoid the fine. Besides, though the words

3 Rep. 72 b.
Dyer 72 b.
224 a.

words of the statute are general, “ that such a fine
“ shall not be prejudicial to the wife or her heirs,” yet
the following words, *viz.* “ but that she may lawfully
“ enter according to her right and title therein, are
“ explanatory, and allow her an entry only in such
“ cases where she had a right before the statute.”

§ 12. If a married man levies a fine of his own inheritance, and five years pass, his wife is not thereby barred of her dower, but is within the second saving of the statute, and will be allowed five years from the death of her husband to make her claim, because her title to dower did not accrue until that period. *Plowden* was of opinion, that, in a case of this kind, the wife was not bound to make her claim within five years after the death of her husband, but might claim her dower at any indefinite period of time; Lord *Coke* says the contrary was expressly determined in 4 *Hen. 8.*, and that determination has ever since been held to be good law.

Plow. 373 n.

2 Rep. 93 a.
Dampport v.
Wright,
Dyer 224 a.
9 Vin. Ab.
245.

§ 13. If the wife's title to dower does not accrue at the death of her husband, but commences at a subsequent period, she will be allowed five years from the time when it accrued.

§ 14. A married man levied a fine with proclamations, and was afterwards indicted and outlawed for high treason. Some years after his death, his heirs reversed the outlawry by writ of error, and then the wife claimed her dower. It was resolved, that although more than five years had elapsed since the death of the

Menville's
Cafe,
13 Rep. 19.
2 Hawk. P. C.
c 49. f. 44.

husband, yet the fine was no bar to her, because, as long as the attainder for treason stood in force, she could not claim her dower; but as soon as the outlawry was reversed, a title to dower first accrued to her, and therefore she was within the second saving, and had five years from the reversal of the outlawry to pursue her right.

§ 15. If there be no person who has a right to make a claim, at the time when a fine is levied, and, afterwards, some person does acquire such a right, he will be allowed five years from the time when he acquired the right of avoiding the fine to make his claim.

Stanford's
Case, cited
Cro. Jac. 61.

§ 16. Thus, where a person who was entitled to a term for years in reversion expectant on another term for years died; the first term expired, the lessors entered and levied a fine with proclamations. Five years passed before administration was granted of the effects of the person who had the reversionary term. It was resolved, that the administrator was within the second saving of the statute, and should have five years to pursue his right from the time administration was granted, because, until then, there was no person who could claim.

Of Persons
having different Rights.
Shep. T. 34.

§ 17. Strangers to fines, having several distinct rights, by several titles, accruing at different times, shall have several periods of five years allowed them to avoid a fine; that is, five years after the accruing of each title; so that, if a right accrues to a stranger when a fine is levied, which he neglects to pursue within the limited time,

time, and another right accrues to the same stranger at any time after, he is then comprehended within the second saving of the statute, as to the new right, upon the principle that, *quando duo jura in una persona concurrunt æquum est ac si essent in diversis*. This construction is certainly not consistent with the letter of the statute, for, in consequence of the words “other persons,” it appears clearly to have been the intention of the statute, that no person who was comprehended in the first saving, should take advantage of the second; and, in the case of *Stowell v. Zouch*, *Dyer* contended that this was the true construction of the statute; but, however, the law has always been held to be otherwise.

9 Rep. 105 b.
Plowd. 372.

Cro. Eliz.
220.

§ 18. Tenant for life levied a fine to a stranger, and the person in reversion neglected to enter within five years after the fine was levied; afterwards, the tenant for life died. It was determined, that the reversioner should have another period of five years from the death of the tenant for life, to make his claim, for, in this case, two distinct rights accrued to him; the first, upon the forfeiture, which the tenant for life committed by levying the fine, and the second, upon the death of the tenant for life.

Laund. v.
Tucker,
Cro. Eliz.
254.
3 Rep. 78 b.

§ 19. It is laid down by Lord *Coke*, that if a lessee for years is ousted, and the person in reversion disseised, and the disseisor levies a fine with proclamations, both the lessor and lessee are barred, if they do not make their claim within five years after the fine has been levied, and the lessor will not be allowed another period

9 Rep. 105 b.

of five years after the expiration of the term, to make his claim; because the lessor might have brought an affize or other real action, immediately after the fine was levied; and, being thus comprehended within the first saving, he cannot take advantage of the second. This doctrine has, however, been since contradicted, and is not now held to be law.

Fermor's
Case, 3 Rep.
77
2 And. 176.
Jenk. 253.

A lessee for 21 years, who was seised in fee of other lands in the same manor, made a lease for life of all the lands, and levied a fine with proclamations of as many messuages, &c. as comprehended not only the lands whereof he was seised in fee, but also the lands which he held for years; the lessee continued in possession, and paid his rent. Upon the expiration of the term, the lessee claimed the inheritance of the land which he had held by lease, and would have barred the lessor, by means of the fine and non-claim, but it was determined by all the judges, that the lessor should have a new period of five years from the expiration of the term, to make his claim and avoid the fine.

2 Vent. 334.

§ 20. This determination is said, by Lord Coke, to have been founded on the circumstances of fraud which appeared in the case, the principal of which was, that the lessee continued in possession after he had levied the fine and regularly paid his rent, so that the lessor could have no notice that a fine had been levied of his lands.

8 Vent. 242.

But, in other books, the judgment is said not to have been founded on the fraud which appeared in the case, but upon the construction of the statute; and the doctrine, that where a lessee for years makes a feoffment,
and

and then levies a fine, the lessor need not make his claim within five years after the fine has been levied, but is allowed another period of five years from the determination of the term, was finally established in the following case.

§ 21. A lessee for years made a feoffment, and then levied a fine; five years passed, and the question was, whether the lessor was barred by his non-claim during the five years which elapsed immediately after the fine was levied, or should be comprehended within the second saving of the statute 4 *Hen. 7.* and be allowed another period of five years from the expiration of the term. The court resolved, that the lessor should have five years from the expiration of the term to avoid the fine, in the same manner as if a lessee for life had levied a fine; the cases being exactly similar.

Whaley v.
Tancred,
1 Vent. 241.
T. Raym.
219.
1 Atk. 571.
S. P.

§ 22. No person who is within the first saving of the statute 4 *Hen. 7.* can be comprehended within the second saving, unless the second right which accrues to him is different from the first; for, if it is only the same right which accrues a second time, the non-claim for five years after the right first accrued, will be a good bar.

§ 23. A tenant in tail made a lease for three lives, which was not warranted by the statute 32 *Hen. 8. c. 28.* He then levied a fine, and died without issue. Five years passed without any claim, but on the expiration of the lease, the person in remainder entered. The court resolved, that he was barred by his non-

Salvin v.
Clerk,
Cro.Car. 156.
W. Jones
211.

claim during the five years which elapsed immediately after the fine was levied, and should not have a new period of five years after the death of the lessee, because he had no other title after his death than he had before, for his title arose upon the death of the tenant in tail without issue, when he might have brought his formedon.

§ 24. If lands are extended on two statutes, and the person who is seised of the land levies a fine, it divests the estates of the cognizees of such statutes, and the cognizee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be for ever barred. But, with respect to the cognizee of the second statute, he need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent; so that he will have five years allowed him from that time to avoid the fine, by the second saving in the statute 4 *Hen. 7.*, because, until then, his right did not accrue.

Deighton v.
Grenville,
2 Vent. 333.
1 Show. 36.
1 Skin. 260.

§ 25. *Thomas Lewis* being seised in fee of the premises in question, acknowledged a statute for 1,200 *l.* to *William Knight*; he afterwards acknowledged another statute for 1000 *l.* to *Richard Gerrard*, and another for 5000 *l.* to *Sir James Elwes* and *Richard Burrows*; execution was sued out on all these statutes, and the lands were extended. *Thomas Lewis*, being in actual possession, sold the lands for 4000 *l.* to *John Lewis*, and levied a fine of them with proclamations. *John Lewis* devised the lands to his brother *Edward Lewis*,

Lewis, and the heirs male of his body, and, for want of such issue, to his own two daughters. *John Lewis* died, and *Edward Lewis* being in actual possession, levied a fine with proclamations, to the use of himself and his heirs, and died without issue, whereby the lands descended to the two daughters of *John Lewis*, who entered, and having married the Earls of *Huntingdon* and *Scarfsdale*, they also entered, and were seised in right of their wives. Administration to *Burrows*, the surviving cognizee of the last statute, was committed to *Ann*, wife of the defendant *Grenville*, as to that statute and the extent thereon; and *Grenville* and his wife, who was also administratrix to *Gerrard* the cognizee of the second statute, having acknowledged satisfaction upon it, and caused it to be vacated, entered upon the Earls of *Huntingdon* and *Scarfsdale*, as administratrix to *Burrows*, in whom the last statute was vested, and claimed the money due on it, whereupon, the said Earls brought an ejectment in the Court of King's Bench in the name of *Deighton*, for the recovery of the lands. The question was, whether *Grenville*, a representative to *Burrows*, the cognizee of the last statute, which was a reversionary interest, to commence after the determination of *Gerrard's* extent, was barred by the fine of *Thomas Lewis* and five years non-claim, or was within the second saving of the statute 4 Hen. 7., and should be allowed five years to make his claim from the time when satisfaction was acknowledged on *Gerrard's* statute. The case was argued several times in the Court of King's Bench, and in 4 Jac. 1. judgment was given for *Grenville*, that *Burrows's* interest was not barred by the fine. A writ of error was brought in the

Vide 2 Vent.
333.

Exchequer Chamber, where the case was also several times argued. Mr. Justice *Ventris* contended, that there was a very great difference between this case and the case of reversions on estates for lives or years. 1st, Because in those estates there was, either by an express limitation of the parties or the operation of law, a certain end of the estate beyond which it could not last, and until which it was not properly determined, which an estate held by extent has not. 2d, Because, if a person who has a reversion after an estate held by extent, was allowed five years to make his claim after the extent was determined by a perception of the profits, or an acknowledgment of satisfaction on record, then a claim was let in after an estate which no man could see the end of, for no person could tell when an extent would be satisfied by a perception of the profits, and much less whether satisfaction would ever be acknowledged; whereas other estates have a known and certain determination, so that it would be impossible to tell within what space of time a possession could be quieted, and thus the great end of the statute of fines would be defeated. 3d, Because it would be in the power of the party who had the extent, to protract the time as long as he pleased, for, until he thought proper to bring a *scire facias ad computandum*, the statute would never be satisfied; so that it would be in the power of a stranger to make the estate of a person who was in possession under a fine, liable to a future claim as long as he pleased. The judgment of the Court of King's Bench was reversed by a majority of six Judges against two. But that court refused to award execution, because there was a mistake in the writ of error,

upon

upon which, a new writ of error was brought, whereon the judgment was affirmed for *Grenville*, there being three judges for reversing, and three for affirming, and a majority being required to reverse the judgment, it was of course to stand. A writ of error was then brought in the House of Lords, where it was contended on the part of the plaintiff, that Mr. *Grenville* could not, by acknowledging satisfaction on *Gerrard's* statute, gain any new right to enter to avoid the fine levied by *Edward Lewis* above nine years before, by which, and by five years non-claim, his interest in the last extent was barred, because an entry might and ought then to have been made into the extended estate, and the contrary opinion would tend very much to weaken the security of a fine and non-claim, which is the highest and best security in the law for quieting people in their estates, and preventing suits; and it would, therefore, be of very pernicious consequence to all purchasers and owners of estates, if such old dormant incumbrances were set up against a fine and non-claim, and supported by such a method as the vacating a statute long before extinguished, for, thereby, estates might be incumbered, which had been long enjoyed without interruption. On the other side, it was argued for the defendant, that it was not necessary to make any claim upon *Burrows's* statute, until *Gerrard's* statute appeared upon record to be satisfied, and so a claim made by the defendant by entry upon the premises, within five years after satisfaction entered upon record, on *Gerrard's* statute, was sufficient to prevent *Burrows's* extent from being barred by the fine. That this case did not differ in reason from the common and

Colles Parl.
Ca. 64.

known

known case where *A.* tenant for life, remainder in fee to *B.* is disseised, and the disseisor levies a fine, and there is five years non-claim, though the estate of tenant for life be barred by this five years non-claim, and the remainder-man may if he please enter upon the five years non-claim by tenant for life, yet he may waive such entry, and will have a new period of five years after the death of tenant for life, to make his claim ; so, although *Burrows* might, if he had pleased, have entered upon the five years non-claim by *Gerrard*, yet he might stay and expect until satisfaction was entered upon the record of *Gerrard's* statute : for, as the death of the tenant for life is the proper and natural determination of an estate for life, so the entering satisfaction upon record, is the proper and natural determination of an extent upon a statute ; and, in the one case as well as the other, before such determination, the remainder-man or reversioner is not compellable to make his claim to avoid the fine.

The judgment of the Court of King's Bench was affirmed.

Plowd. 538.
Tit. 31. ch. 2.
f. 41.

§ 26. Although the statute 4 *Hen.* 7. does not extend to the possessions of the church, yet in case a bishop, dean, vicar, or prebendary, should neglect to make his claim within five years after a fine is levied of an estate to which he is entitled, in right of his bishoprick, &c. he will be barred during his life, but his successor will be allowed five years to avoid the fine, from the time of his becoming entitled to the lands.

§ 27. In the same manner, all those who have offices for life, to which lands and tenements are annexed, must make their claim within five years after a fine has been levied of such lands and tenements, otherwise they will also be barred during their lives. But each successive officer will be allowed five years to avoid the fine, from the time when he becomes entitled to the lands. Plowd. 538.

§ 28. If the estate which passed by a fine is at any time afterwards defeated, the fine will by that means lose all its force and effect, not only with respect to the person who avoided it, but also with respect to all other persons, except those who claim by force of an intail. Thus, it is said in the case of *Stowell v. Zouch*, that if there be tenant for life, remainder for life, remainder in fee, and the first tenant for life aliens, and the alienee levies a fine, the person in remainder for life may enter and defeat the fine, in which case, it will not bar the remainder-man in fee. Idem.
2 Inst. 518.
West. Symb.
p. 2. 73 a.

Plowd. 359.

§ 29. By the common law, and also by the statute *de modo levandi fines*, all those who laboured under certain disabilities at the time when a fine was levied, were not affected by it; but they or their heirs might avoid it, at any distance of time. This doctrine was altered by the following clauses in the statute 4 Hen. 7: “ And “ if the same persons at the time of such action, right, “ and title accrued, descended, remained or come unto “ them, be *covert de baron*, or within age, in prison, “ or out of this land, or not of whole mind, then it “ is Of the Ex-
ceptions in
favour of In-
fancy, &c.
Bract. l. 5.
c. 29. f. 3.
Fleta l. 6.
c. 54. 2 Inst.
516.
4 Hen. 7.
c. 24. f. 5.

“ is ordained, &c. that their action, right, and title,
 “ be reserved and saved to them and their heirs, until
 “ the time they come and be at their full age of twenty-
 “ one years, out of prison, within this land, uncovert,
 “ and of whole mind ; so that they or their heirs take
 “ their said actions, or their lawful entry, according to
 “ their right and title, within five years next after that
 “ they come and be at their full age, out of prison,
 “ within this land, uncovert, and of whole mind ; and
 “ the same actions pursue, or other lawful entry take,
 “ according to law.

“ And also it is ordained, &c. that all such persons
 “ as be *covert de baron*, not party to the fine, and
 “ every person being within the age of twenty-one
 “ years, in prison, or out of this land, or not of whole
 “ mind, at the times of the said fines levied and en-
 “ grossed, and by this said act afore except, having
 “ any right or title, or cause of action to any of the
 “ said lands and other hereditaments, that they or their
 “ heirs, inheritable to the same, take their said actions,
 “ or lawful entry, according to their right and title,
 “ within five years next after that they come and be
 “ of age of twenty-one years, out of prison, uncovert,
 “ within this land, and of whole mind, and the same
 “ actions sue, or their lawful entry take, and pursue
 “ according to the law ; and if they do not take their
 “ actions and entry as is aforesaid, that they, and every
 “ of them, and their heirs, and the heirs of every of
 “ them, be concluded by the said fines for ever, in
 “ like form as they be that be parties or privies to the
 “ said fines.”

§ 30. In consequence of these two clauses, all those who labour under any of the disabilities therein specified, either at the time when a fine is levied, or when a right to lands whereof a fine has been levied first accrues to them, are allowed five years from the removal of their disabilities to make their claim.

§ 31. If an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age to make his claim: for although he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception. Plowd. 366.

§ 32. If a person labours under several disabilities, at the same time, as if a woman is covert, under age, of insane mind, and in prison at the time when a fine is levied, or when a right to lands whereof a fine has been levied accrues to her, and one or more of those disabilities are removed, still the five years given by the statute will not commence until after all her disabilities are entirely removed. Plowd. 375.
1 Leon. 215.
2 Atk. 614.

§ 33. It is stated by *Plowden*, in his report of the case of *Stowell v. Zouch*, that it was affirmed by many of the justices, and denied by none of them that he heard, that although the persons comprised in the exception were not under such defects or impediments at the time of the fine levied, but became so against their will, after the fine levied, and before the last proclamation, Plowd. 366.

proclamation, and were in such degree at the time of the last proclamation, they shall not be bound to five years next after the last proclamation, but they shall have five years next after their impediments or imperfections removed.

Plowd. 366.

§ 34. It was also said in the same case by *Brown and Saunders*, that if a stranger to a fine who is of sound mind, becomes *non sanæ memoriæ*, or is imprisoned the third year after the proclamations made, and so continues until the five years are expired, and afterwards he becomes of sound mind, or is out of prison, he shall not be concluded by the fine; for laches in prosecuting his right cannot be imputed to him who wants liberty or memory, and therefore such person is not comprehended in the intent of the statute. But in this case if a stranger to the fine in the third year had gone beyond sea, or had taken husband and so had continued, until the five years were passed, there he should be bound; for the going beyond sea, or taking husband, are voluntary acts, but insanity of mind, or imprisonment, are against the will of the party.

Vide *Doe ex dem. Duroure v. Jones*,
4 Term Rep.
B. R. 300.

§ 35. The doctrine laid down in the last section has been exploded by two modern cases, in which it has been laid down as a rule, that when once the five years allowed to persons labouring under disabilities, to avoid a fine begin, the time continues to run, notwithstanding any subsequent disability.

§ 36. It is said by some of the judges in the case of *Stowell v. Zouch*, that if a person whose defects or impediments are once removed, falls within a month after into the same defects or impediments again, and continues so all the five years, or at the end of the first month of the five years dies, his heir within age, the five years before commenced shall proceed, and non-claim within the same five years shall bind the party and his heirs, as well as if he had been void of all defects or impediments during the whole five years. Plowd. 375.

§ 37. Although the statute 4 *Hen. 7.* allows infants five years after they have attained their full age, to make their claim, yet an infant may, if he pleases, make his claim before he attains that age. Plowd. 366.
1 Leon. 215.

§ 38. The privileges of infancy, coverture, &c. are only given to those to whom a right first accrues, and in whom it first attaches; for if a person to whom a right first accrues, dies before the expiration of the first five years, which are allowed him to make his claim, and such right descends upon his son or heir at law who is then under age, or labours under any of the other disabilities mentioned in this act, still such son or heir must make his claim before the five years are expired, which commenced in the life-time of his ancestor, otherwise he will be for ever barred, because the right did not first accrue to him, but to a person who was not under any disability.

Stowell v.
Zouch,
Plowd. 355.
Jenk. Cent.
6. Case 74.

§ 39. *John Stowell* being seised in fee, was disseised by *John Zouch*, who levied a fine with proclamations. Three years after the fine was levied, *John Stowell* died, without having made any entry or claim to avoid the fine, leaving his grandson and heir at law, *Thomas Stowell*, the demandant, an infant of the age of six years, who made no claim during his minority, but entered on the lands within one year after he had attained his full age. It was determined by a great majority of all the judges in the Exchequer Chamber, after many solemn arguments, 1, That *Thomas Stowell* being a stranger to the fine, was clearly barred by the body of the act, unless he would take advantage of the exception in favour of infants, &c. and that he was not within the exception, because it only extends to such infants, &c. to whom a right accrues at the time when a fine is levied: whereas in the present case, no right accrued to *Thomas Stowell* at the time when the fine was levied, his grandfather being then living. 2, That *Thomas Stowell* was originally within the first saving of the statute, as heir to his grandfather, to whom the right first accrued, being included in the words "saving to every person and persons, and to their heirs;" but not having pursued his remedy within the time prescribed, he could not now take any advantage of the first saving: and, with respect to his infancy at the time of his grandfather's death, it could be of no service to him, because the statute only gives the privilege of infancy to those to whom a right first accrues: but where a right first accrues to a stranger who is of full age, and the five years

years begin to run, if such stranger dies before the expiration of the five years, leaving his heir under age, the heir can have no privilege of infancy, but must make his claim before the expiration of the five years, which began to run in the time of his ancestor.

3, That *Thomas Stowell* was not within the second saving, which preserves to all *other persons* such right, title, &c. as shall first grow, remain or descend to them after the said fine ingrossed, for several reasons ; 1st, Because, in consequence of the words *other persons*, this saving only extends to those who are not comprised in the first, and it was not the intention of the act to aid those persons in the second saving who are comprehended in the first. 2d, The words, first grow, remain, or descend, only extend to the person in whom the right first attaches after a fine is levied ; whereas no new right accrued to *Thomas Stowell* after the fine was levied, his only title being as heir to his grandfather, in whom the right attached when the fine was levied.

§ 40. If a person to whom a right accrued to lands whereof a fine had been levied, laboured under any of the disabilities specified and excepted in the statute 4 *Hen. 7.* and died before his disabilities were removed, it was formerly a doubtful point, whether the heir of such a person was obliged to make his claim within five years after the death of his ancestor, or was allowed an indefinite period of time for that purpose.

Case of Persons dying under their Disabilities.

2 Inst. 519.
Cro. Eliz. 219.
1 Leon. 211.
Sav. 128.

This doubt arose from a difference of opinion between Lord *Coke* and *Anderson*; Lord *Coke*, in his report of the case of *Sunie v. Howes*, states that *Thomas Cotton* being tenant in tail of a moiety of certain lands, and tenant for life of the other moiety, with remainder to *William Cotton*, his eldest son in tail, *William Cotton* went to *Antwerp*. *Thomas Cotton* levied a fine with proclamations of all the lands, and *William Cotton* died soon after at *Antwerp*, without having ever returned to *England*, leaving a son under age, who entered on the lands. It was adjudged, that as to the moiety whereof *Thomas Cotton* was tenant in tail, *William*, the son of *William*, was barred by the statute 4 *Hen. 7*. But as to the other moiety, whereof *Thomas Cotton* was only tenant for life, the entry of *William* the grandson was lawful, and avoided the fine; for although *William* the son could not take advantage of the clause which saves the right of those who are beyond sea, provided they make their claim within five years after their return, because *William* the father never did return, yet as persons who are out of the realm at the time when a fine is levied, having a present right, are excepted out of the body of the act, which makes the bar, therefore, where a person was beyond sea at the time when a fine was levied, and never returned, he was within the exception made in the body of the act, and his heirs might make their claim at any distance of time. That it was the same where an infant, not being a party to a fine, and having a present right, died during his infancy, his heirs might make their claim at any distance of time. That the same doctrine took place with

with respect to a man *non compos*, who died in that situation, or a man in prison who died before he had recovered his liberty, or a married woman who died in the lifetime of her husband; for all these were within the reason adjudged, of a person who was out of the realm, and never returned.

It is also laid down by Lord Coke, in *Beverley's* 4 Rep. 125 b. case, "That if a man levies a fine with proclamations, and at the time of the fine levied, he who has a right is *non compos*, and afterwards he recovers his memory, in this case he ought to pursue his action, or make his entry, within five years after he becomes of sound memory; and in such case, in pleading, he shall shew, that, at the time of the fine levied, he was *non compos mentis*, and all the special matter: but if he who has such right is an idiot, or *non compos mentis*, and never recovers his memory, the heir may have his action, or make his entry when he will; for he is excepted out of the body of the act, and is not bound to make any entry, or bring his action within any time, but the party himself, if he recovers his memory. The same law, if he who is beyond sea at the time of the fine levied, and dies, there his heir may enter, or bring his action when he will,"

In *Leonard's* report of *Cotton's* case, it was held, that as to the moiety whereof Sir Thomas Cotton was tenant for life, the fine was no bar, but that William the grandson might enter at any time within five years after he attained his full age, for William his father was not

Cotton's
Case, 1 Leon.
211.

1 Leon. 215.

bound by the statute 4 Hen. 7. because he was beyond sea at the time when the fine was levied, and never returned; but that, by the equity of the statute, his issue should be allowed five years to make his claim, from the time he attained his full age. And *Anderson*, Chief Justice, is reported to have said, that although *William* the father died beyond sea, yet, if his son did not make his claim within five years after the death of his father, being of full age, and without impediment, he should be for ever barred.

§ 41. The doctrine laid down by *Anderson* has been confirmed by the following determination :

Dillon v.
Leman,
2 Hen. Black.
Rep. 584.

William Nanton died seised in fee-simple of the lands in question in 1758, leaving *Mary Dillon*, mother of the plaintiff, his heir-at-law; upon the death of *William Nanton*, one *Leman* entered into the said lands, and became tortiously seised thereof, and, being so seised, in Hilary term 1765, levied a fine *sur cognizance de droit come ceo*, &c. of the said lands, whereupon proclamations were duly had: the said *Mary Dillon* being under coverture at the time of levying such fine. On the 20th February 1765, the said *Mary Dillon* died under coverture, leaving the plaintiff then of the age of 21 years, of sound mind, out of prison, and within this realm, her son and heir. No entry or claim was made on or to the said lands by or on behalf of the said *Mary Dillon* in her life-time, nor at any time after by her husband, nor by the plaintiff, until the year 1787, when the plaintiff made an entry to avoid the said fine. And the question was, whether, on the
above

above case, the plaintiff was barred by the said fine from recovering the said lands?

This case having been sent by the Court of Chancery to the Court of Common Pleas, for the opinion of that court, and, having been twice argued there, Lord Chief Justice *Eyre* declared shortly the opinion of the court, “ that the
 “ exception in the first branch of the statute 4 *Hen. 7.*,
 “ and the proviso at the end of it, were to be taken to-
 “ gether; that, being so taken, they did not amount so
 “ much to an exception as a saving, the true meaning
 “ of which was, that the rights of those persons who
 “ were under disabilities, and of their heirs, were saved
 “ as long as the disabilities continued, and five years
 “ after, but no longer; therefore, that the heir, not
 “ being himself disabled, was barred, unless he pur-
 “ sued his right within the five years after it accrued
 “ by the death of his ancestor, dying under a disability;
 “ and, consequently, that the plaintiff, in this case,
 “ was prevented by the fine from recovering the lands
 “ in question.” And to this effect was the certificate
 sent to the Court of Chancery.

TITLE XXXV,

FINE.

CHAP. XII.

Of some other Effects of a Fine.

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| <p>§ 1. <i>A Fine sometimes operates as a Release.</i></p> <p>4. <i>Sometimes as a Confirmation.</i></p> <p>6. <i>A Fine lets in the Reversion, and makes it liable to prior Incumbrances.</i></p> | <p>§ 8. <i>Operates as an Abbey.</i></p> <p>10. <i>Sometimes creates a Forfeiture.</i></p> <p>19. <i>Operates as a Revocation of a Devise.</i></p> <p>20. <i>A Fine sur done Grant and Render, gives a new Estate.</i></p> |
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Section 1.

A Fine sometimes operates as a Release.

THE operation of a fine frequently depends on the particular situation of the cognizor or cognizee, respecting the property of which it is levied. Thus, if one joint-tenant levies a fine to his companion, it will operate by way of release.

Euface v.
Scawen,
Cro. Jac.
696.

§ 2. *John Stile and Susan a feme sole, were joint-tenants for life. Susan married; and she and her husband granted by fine to John Stile tenementa prædicta et totum et quicquid habent pro termino vitæ prædictæ Susan, &c.* The question was, whether the fine should enure by way of grant, or release; and it was resolved that it should enure by way of release.

1 Inst. 200 b.
n. 1.

§ 3. If one coparcener in tail levies a fine to another *sur cognizance de droit, &c.* it does not enure by way

way of release, but by way of grant; and it will be a discontinuance and alteration of estate, without execution, because one coparcener may enfeoff another, and a fine is a feoffment of record.

§ 4. A fine may also operate as a confirmation of a former estate which was before defeasible. Thus, if a tenant in tail bargains and sells his estate-tail in fee, and then levies a fine to the bargainee, the fine will operate as a confirmation of the estate which passed by the bargain and sale. So, if a tenant in tail makes a lease not warranted by the statute, confesses a judgment, makes a mortgage, or incumbers his estate in any other manner, and afterwards levies a fine, it will operate as a confirmation of all his prior charges and incumbrances.

Sometimes as a Confirmation.

2 Roll. Ab.

473.

Seymour's Case, infra. ch. 14.

1 Ab. Eq.

257.

§ 5. In the same manner, where a tenant for life and the remainder-man in tail join in granting a rent-charge in fee out of the land, and afterwards join in levying a fine to another person, the rent which was before determinable will be confirmed by the fine.

Holbeach v. Simbeach, Winch. 102.

§ 6. The operation of a fine levied by a tenant in tail who has the immediate reversion in fee in himself, is to merge the estate-tail, and bring the reversion in fee into immediate possession, by which means, it will become liable to the incumbrances of all those who are seised of it. So that if a tenant in tail, with the immediate reversion in fee in himself, makes a lease, acknowledges a judgment, or incumbers his estate in any

A Fine lets in the Reversion and makes it liable to prior Incumbrances.

Symonds v.

Cudmore,

Tit. 17. f. 34.

Shelburne v.

Biddulph,

Idem f. 35.

other manner, and his heir levies a fine, it will operate as a confirmation of the lease or judgment.

§ 7. In the same manner, where a person is tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, and becomes indebted by bond, or incumbers the estate in any other manner; if, after the death of such a tenant for life, his son levies a fine, it will let in the reversion in fee, and make it liable to his father's incumbrances.

Kynaston v. Clark, Tit. 17. f. 26.

§ 8. A fine being a judgment obtained by consent in a fictitious suit, and recorded in a court of justice, all those who are parties to it, and their heirs, are for ever concluded from averring or proving any thing against it, and therefore it operates towards them as an estoppel upon record. Thus, although a fine levied by persons who have not an estate of freehold in the lands, is void as to all strangers; yet it will operate as an estoppel against all the parties to it. So, if two persons are seised in fee, and a stranger levies a fine to them, and to the heirs of one of them, the other will be thereby estopped from claiming any thing more than an estate for life in the lands.

Operates as an Estoppel. 1 Inst. 352 a.

Shep. T. 14.

Weale v. Lower, Tit. 16. ch. 8. f. 20. Vick v. Edwards, Id. f. 9.

§ 9. A contingent remainder may, before it vests, be barred by a fine, which will operate as an estoppel, so as to bind the interest that may afterwards accrue by the contingency.

§ 10. Where a person who is only tenant for life, levies a fine *sur cognizance de droit come ceo, &c.* it will operate as a forfeiture of his estate, because it is an attempt to create a greater estate than he can lawfully convey, and a renunciation of the feudal connection between the tenant and his lord. So, if a tenant for life accepts a fine *sur cognizance de droit come ceo, &c.* it is also a forfeiture of his estate for life, for it is a denial of the tenure upon two accounts; 1st, In admitting the reversion to have been in a stranger to convey; and, 2d, In accepting of it himself, to the prejudice of the person in reversion.

Sometimes creates a Forfeiture.

1 Inst. 251 b.
Gilb. Ten. 38.
Prec. in Ch. 591.

9 Rep. 106 b.

§ 11. If a tenant for life of a rent or advowson levies a fine, it will have the same effect, for although the fine being levied of a rent passes no more than it lawfully may, yet being a public and solemn renunciation of the estate for life in a court of record, it is within the reason of the law, and amounts to a forfeiture.

1 Inst. 251 b.

1 Roll. Ab. 852.

§ 12. If A. be tenant for life, with remainder to B. for life, and A. levies a fine to B., this is a forfeiture of both their estates; for, by their own act on record, they have denied the reversion to be in the lord, the one by giving, and the other by receiving it.

2 Lev. 202.

Smith v. Abell.
Co. Read. 3.

§ 13. A. was tenant for life, remainder for life to B., remainder in tail to C., remainder in fact to B., and B. levied a fine *sur cognizance de droit come ceo, &c.* to a stranger. It was adjudged to be a forfeiture of his remainder

Garrett v. Blizard,
1 Roll. Ab. 855.

remainder for life, so that, after *A.*'s death, *C.* might enter, because the fine conveyed a fee-simple in possession by estoppel, against which he could not aver that he only passed an estate for life in *presenti*, with a fee-simple expectant on the death of *C.* without issue; because the fine supposes a prior gift in fee-simple, which he could not lawfully make while the estate for life of *A.* and the intermediate remainder of *C.* in tail were subsisting.

§ 14. But where the person who has the next estate of inheritance joins with the tenant for life in levying a fine *sur cognizance de droit come ceo, &c.* it does not then operate as a forfeiture.

Bredon's
Case, 1 Rep.
76
3 Vent. 160.

§ 15. *A.*, being tenant for life, with remainder in tail to *B.*, they both joined in levying a fine *sur cognizance de droit come ceo, &c.* to a stranger in fee. It was resolved, that this was neither a discontinuance nor a forfeiture, but that each of the parties to the fine gave that which he might lawfully dispose of, and that the law would construe it to be, first, the grant of the person in remainder, and afterwards the grant of the tenant for life.

Pigott v.
Salisbury,
2 Mod. 109.

§ 16. A fine *sur concessit* levied by a tenant for life, does not operate as a forfeiture of his estate, because it only transfers such an interest as the tenant for life may lawfully pass, without divesting or displacing the estates in remainder or reversion,

§ 17. No fine levied by a *cestui que trust* will be allowed in Chancery to operate as a forfeiture, because it cannot affect the subsequent remainders; and, therefore, such a fine will, in equity, operate at most as a grant of the interest of which the *cestui que trust* has a power to dispose.

2 P. W. 146,
3 Atk. 729.

§ 18. If a copyholder levies a fine of his copyhold, it will operate as a forfeiture, and, in such case, no acceptance of the rent, or other act done by the lord, shall be available to make the estate again good.

Supp. to Co.
Cop. ch. 11.

It is said, in a modern case, that this doctrine is too general, for, unless there is a change of possession, the fine will be void as against the lord.

Doe v. Hel-
lier, 3 Term
Rep. 162.

§ 19. A fine will, in general, operate as a revocation of a prior devise of the lands whereof the fine is levied. The reason of which, will be stated in Title 38.

Operates as a
Revocation
of a Devise.

§ 20. In a fine *sur done grant et render*, the cognizee is but an instrument, who has a seisin only for an instant, which is not sufficient to entitle his wife to dower; however, this fine operates as a feoffment, and re-enfeoffment, and gives a new estate. So that, if a person, seised of an estate *ex parte materna*, levies a fine *sur done grant et render*, and takes back an estate to himself and his heirs, the nature of the descent is thereby altered, and the estate will thenceforth descend to his heirs *ex parte paterna*.

A Fine sur
done grant et
render, gives
a new Estate.
1 Inst. 31 b.

Price v.
Longford,
1 Show. Rep.
92. Salk. 337.
Carthew 140.
Rep. Temp.
Holt 253.

§ 21. *J. S.* being seised of lands *ex parte materna*, he and his wife levied a fine to *J. N.* and *J. D.*, and they, by the same fine, granted and rendered the same lands to the use of the said *J. S.* and his wife, and the heirs of their two bodies, remainder to the right heirs of *J. S.* The husband and wife died without issue, and the question was, whether this remainder descended to the heirs of the part of the mother, or of the part of the father. It was argued, on the one side, that this seisin of the cognizee was merely fictitious; for, if the cognizee had a term for years in the land, it would not be merged; that it was like the case of a surrender of a copyhold into the hands of the lord, who was thereby only a mere instrument; therefore, that nothing was altered by the fine, but the estate remained as before. On the other side, it was contended, that the cognizee could not render the estate unless he had it in him, and that the grant and render operated as a feoffment and re-enfeoffment. The court held, that the estate was once in the cognizee, otherwise he could not give it back: that the grant and render was a conveyance at common law, and made the cognizor a new purchaser, as much as a feoffment and re-enfeoffment; so that the remainder descended to the heirs on the part of the father.

§ 22. It is observable, that this is the only sort of fine which gives a new estate; for, if a person seised *ex parte materna* levies a fine *sur cognizance de droit come ceo*, and either makes no declaration of the uses of it, or declares it to be to the use of himself and his heirs,

Tit. 29. c. 3.
L 56.

heirs, the lands will still descend *ex parte materna*, because it is still the old use, which, consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have descended, if no alteration had been made ; and it is totally immaterial, whether the use be expressly declared upon a fine, or permitted to arise by implication.

TITLE XXXV.

FINE.

CHAP. XIII.

What Persons, Estates, and Interests, are not barred by a Fine.

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| <p>§ 2. <i>The King.</i>
 3. <i>Ecclesiastical Corporations.</i>
 5. <i>Estates not devised.</i>
 8. <i>A future Right.</i>
 13. <i>A Rent, Right of Way, or Common.</i></p> | <p>15. <i>Necessity of an adverse Possession.</i>
 18. <i>Estates Tail of the Gift of the Crown.</i>
 19. <i>Springing and shifting Uses.</i>
 20. <i>Dignities.</i></p> |
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Section 1.

NOTWITHSTANDING the great force and effect of a fine, yet there are some particular persons, estates, and interests, to which its operation does not extend.

The King.

§ 2. By the common law no laches can be imputed to the King, and therefore no delay or omission on his part in making a claim will bar his right: from thence has arisen the maxim, *nullum tempus occurrit regi*, for the law supposes his Majesty to be always busied for the publick good, and therefore that he has not leisure to assert his right within the time prescribed for other persons. It follows from this principle that the King cannot be barred by a fine, to which he is not a party, and five years non claim; nor is his Majesty's prerogative

gative in this instance taken away by the statute 9 Geo. 3. c. 16. by which the King is only disabled to sue for any manors, lands, or hereditaments, where the right has not accrued to the Crown within sixty years. '

§ 3. Ecclesiastical corporations, and in general all ecclesiastical persons, who are seised in right of their churches only, and have not an absolute estate in their possessions, being restrained from alienation by several positive statutes, are not only prohibited from levying fines, but cannot even bar their successors by their non-claim*.

Ecclesiastical
Corporations.

§ 4. Thus in the case of Magdalene College, one of the points was, whether the master and fellows were bound by a fine and five years non-claim; and it was resolved that the right of the college was not barred by the fine and non-claim, for the words of the statute 13 Eliz. c. 10. which prohibits all ecclesiastical corporations from alienation were, "that all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, or suffered by any masters and fellows of any college, &c." So that when a fine was levied and no claim was made for five years, there was a conveyance permitted and suffered by the master and fellows of the college; and it would have

11 Rep. 78 b.
1 Roll. Rep.
151
Watf. Comp.
ln. 427.

* This agrees with the principles of the old law, as laid down by *Bracton*. *Illud item ut videtur observari deberet de jure et feodo ecclesie, si rector clameum non apposuerit, quod ecclesia non prejudicatur, cum fungatur vice minoris, non magis quam minori si custos clameum non apposuerit.* Lib. 5. c. 29. l. 3.

Howlet v.
Carpenter,
9 Keb. 775.
S. P.

Ch. 11.

Estates not
divested.

9 Rep. 106 a.
T. Raym. 149.

* Vide Tit. 29.
ch. 1.

been of no effect to have prohibited the master and fellows themselves from making conveyances of their lands, if they were allowed to have a power by their permission and non-claim, to bar their successors. A bishop, dean, or vicar, may, however, be himself barred by his own non-claim, as has been stated in a former chapter.

§ 5. It is laid down by Lord *Coke* as a certain principle, that no fine will bar any estate in possession, reversion, or remainder, which is not divested and put to a right. This position is however too general, if the words "divested and put to a right" are understood in that strict technical sense which the law annexes to them. The word "divest" signifies nothing more than a mere deprivation of the possession*; but the words, "put to a right," have a much more extensive signification, for they mean, a deprivation not only of the possession, but also of the right of possession; so that where an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property. If therefore Lord *Coke's* position be taken strictly, it will appear to be unsupported by any authority; for although it be necessary that an estate be divested before it be barred by a fine, yet it is by no means necessary that an estate should be put to a right.

* *Divest*, *divestire*, is contrary to *invest*, for as *investire* signifies *possessionem tradere*, so *divestire* means *possessionem auferre*. Cowell's Dict. i lib. Feud. tit. 7.

§ 6. Thus in the case of *Stowell v. Zouch*, when *Stowell* was disseised by *Zouch*, his estate was merely Ante ch. 11.
f. 39.
deveſted, that is, he had only loſt the actual poſſeſſion, but it was not turned to a right, for he ſtill continued to have in him both the right of poſſeſſion and the right of property, and yet all the judges agreed that he was barred by the fine.

This caſe, and many others which will be mentioned in the preſent chapter, clearly prove the general rule to be—That no eſtate or intereſt can be barred by a fine unleſs it is deveſted out of the real owner, either before the fine is levied, or by the operation of the fine itſelf, that is, unleſs the real owner is turned out of poſſeſſion of ſuch eſtate or intereſt, and that while he continues in poſſeſſion, a fine will not affect him.

§ 7. The caſe in which this principle was laid down, and Lord *Coke*'s expreſſion in ſtating the reſolution of the Court, ſhews that this was the idea which he annexed to the words “put to a right,” for, ſays he, “he who has the eſtate or intereſt in him, cannot
9 Rep. 106 a:
“be put to his action, entry, or claim, for he has
“that which the action, entry, or claim, would veſt in,
“or give him :” and in another place he ſtates this principle in the following words: “No fine levied
5 Rep. 123 B.
2 Infl. 517.
“with proclamations ſhall bind any but thoſe who are
“put out of poſſeſſion, and have but a right, for if
“their eſtate or intereſt be not deveſted out of them,
“but remains in them as it was *ab initio*, they need
“not make an entry or claim to that which never was
“deveſted.” Theſe paſſages fully prove Lord *Coke*'s

meaning to have been, that no person could be barred by a fine, unless he was first turned out of possession, and had only a right of entry or action left in him; for if a person continued in possession, after a fine had been levied, he could be under no necessity of making his claim or bringing his action; because being still in possession, and not disturbed by the fine, he had already all the advantages which those remedies could procure him, and therefore it would be unnecessary to pursue them.

Corbet v.
Stone, Ante
ch. 10. f. 38.

A future
Right.

§ 8. It follows from this principle, that a future right cannot be barred by a fine; because a person cannot be dispossessed of it.

Ch. 10. f. 34.
5 Rep. 124 b.

§ 9. Thus, in *Saffin's* case, it was agreed, that although a term for years might be barred by a fine, if the lessee were, or might have been in possession, yet that so long as a lessee for years had only an *interesse termini*, he was not affected by a fine; because a man cannot be dispossessed of an *interesse termini*. But when his term commenced, and he acquired a right to enter on the land, he then had such a present estate as might be divested, and which he might re-vest by his entry; so that his non-claim for five years after the commencement of his term, barred him; because from that time he was out of possession.

Edwards v.
Slater,
Hard. 410.

§ 10. A man settled lands to the use of himself for life, and if he should settle a jointure on his wife, and make a lease for thirty-one years, to commence after his death, that then the trustees should stand seized to such

such uses. He made a lease accordingly, and then he and his wife levied a fine. It was resolved that the lease was not barred, because being a future interest, it was not divested or displaced by the fine.

§ 11. The interest of tenants by statute-merchant, statute-staple, or elegit, cannot be barred by a fine until they have extended the lands, or pursued their rights in some other manner; for until then, they have no right to enter on the lands, and therefore cannot be put out of possession.

1 Mod. 217.
Ante c. 10.
f. 41.

§ 12. So where a man has a judgment for debt, and the debtor before execution aliens by fine, and five years pass, yet the creditor may still sue out execution.

1 Cha. Ca.
268.
1 Freem. 211.

§ 13. Although the owner of a rent may bar it by a fine, yet a rent in the possession of a third person cannot be so barred. It is the same of a right of way, or common; because these being merely contingent rights, collateral to and issuing out of lands, they cannot be divested; for although a person who has a rent, right of way, or common, out of lands, be not in the actual enjoyment of them, yet by *non-user* alone, he does not cease to have a vested estate or interest therein, so that he still continues to be in actual possession; such things being mere creatures of the law, and owing their existence to the construction thereof, they are always considered to be in the possession of those whom the law adjudges to have a right to such possession.

A Rent, right
of Way, and
Common.

5 Rep. 124.
Bro. Ab. Tit.
Fine, pl. 123.
Shep. T. 22.
Cro. Jac. 60.
T. Raym.
149.
1 Freem. 312.

Hawk. P.C.
ch. 64 f. 45.

10 Rep. 97 a.
Tit. 28. ch. 2.
f. 33.

It is said that a rent may be divested by a disseisin ; but disseisins of incorporeal hereditaments are only at the election and choice of the party injured, who, for the sake of more easily trying the right, is pleased to suppose himself disseised ; for as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

§ 14. These principles have been recently confirmed by the Court of King's Bench, in their determination of the following case :

Mich. 23 G.
3. Goodright
ex dem.
Hare v. Board
& Jones, MS.

In an ejectment for lands in *Surry*, the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case. Lord *Bolingbroke*, being seised in fee of the premises in question, by indenture of lease, dated the 1st *March* 1765, demised the same to *William Stevens* for twenty-one years, at the rent of 100 *l.* which lease, by mesne assignments, became vested in the defendant *Board*. Lord *Bolingbroke*, by a bond dated 24th *July* 1770, with warrant of attorney to confess judgment, in consideration of 3000 *l.* became bound to the lessee of the plaintiff in the penal sum of 6000 *l.* conditioned for the payment to her of an annuity of 500 *l.* during his own life ; and by indenture of the same date, Lord *Bolingbroke*, in consideration of the said 3000 *l.* and as a farther security for the annuity, demised the premises in question to the lessor of the plaintiff for ninety-nine years, if his Lordship should so long live, at a pepper-corn rent, with a proviso, that the lessor of the plaintiff should the next day re-demise the premises to Lord *Boling-*

broke for ninety-eight years and eleven months, if he should so long live, at the rent of 500 *l.* which was accordingly done. Lord *Bolingbroke*, by lease and release dated the 9th and 10th *March* 1773, conveyed the premises, for a fair and valuable consideration, to the defendant *Jones* in fee, who had no notice of the annuity granted to the lessor of the plaintiff. *Jones* being in possession, levied a fine of the premises, with proclamations in *Trinity* Term 1775, to the use of himself in fee. The annuity was in arrear from the 24th *January* 1774, and the ejectment was brought in *Hilary* term 1782. Lord *Mansfield*.—We have looked into all the cases, and have no doubt. It appears that the lessor of the plaintiff, and the defendant *Jones*, are both innocent; *Jones* is a purchaser for a valuable consideration, without any notice of the lessor of the plaintiff's title; the lessor of the plaintiff is not alleged at any time to have known of the conveyance to *Jones*, and there was no circumstance of notoriety attending the transfer to give her such notice; for the visible possession continued the same after the sale as before it; the lease to *William Stevens* subsisting, and the payment of rent to *Jones*, instead of Lord *Bolingbroke*, carried with it no notoriety in the country. At the time of the conveyance, there was no arrear of interest due to Mrs. *Hare*, and therefore she had no right to come upon the land in any shape. If she was guilty of laches afterwards, there could be no *mala fides* in it with respect to *Jones*, as he is under no disadvantage from it: so that it is a question of mere law between two innocent parties, whether the right and interest of the lessor of the plaintiff is barred by

the fine and non-claim. This depends on one clear proposition, which is a general rule of law founded in good sense; and although it be difficult to find a rule without an exception, yet I know of none to this proposition. It is laid down in 9 *Co. Rep.* 106 *a.* “Resolved *per totam Curiam*, that no fine nor warranty shall bar any estate in possession, reversion, or remainder, which is not divested and put to a right.” This general rule is illustrated and applied to several cases throughout the books; and hence it follows, that no collateral interest can be barred by a fine; as a rent-charge, a right of common, &c. and the authority cited from *Carter* 24. that a rent-charge may be barred by a fine, is totally mistaken; for, in looking into it, it appears to be thus; the owner of a rent-charge levied a fine of the land; the question was, whether the rent-charge passed by the fine; and a distinction was taken between a fine operating as a grant or as a bar. Here the fine operated as a grant, and not as a bar; the rule is universal, that a rent-charge in a third person is not barred by a fine and non-claim. Hence the parties to a fine, or one of them, must be in of a seisin or possession adverse to that interest which is to be barred; for, if it be consistent with it, the fine does not divest it, and therefore is no bar. Now, at the time of the conveyance to *Jones* in 1773, Lord *Bolingbroke* had no adverse possession; he had paid all arrears, and as the lessor of the plaintiff had no right to come on the land but for arrears, she had then no title in her. At the time when the fine was levied, there was an arrear of a year and an half due; but the lessor of the plaintiff was not bound to resort to

the lands for her remedy, she had other securities; besides, she could not enter on the lands, the lessee for years being in possession; all she could do was by notice to the tenant under the statute 4 & 5 *Ann. c. 16.* which makes attornment unnecessary, either to distrain or bring an action for the rent. In every shape it is most clear, that the lessor of the plaintiff's interest was not divested or turned to a right; and therefore that it remained after the fine just as it did before. Judgment was given for the lessor of the plaintiff.

§ 15. It is not only necessary that a person should be out of possession to be affected by a fine, but it is also requisite that the party levying the fine should have an adverse possession inconsistent with that of the person to be barred; so that if the possession of the party who levies a fine is consistent with that of any other person, such other person will not be affected by it.

Necessity of
an adverse
Possession.

§ 16. Thus, it has been settled, that the possession of one joint-tenant is the possession of the other, so as to prevent the effect of the statute of limitations; and that where there are two joint-tenants in fee, if one of them levies a fine of the whole, it does not amount to an ouster of his companion, but only severs the jointure, though he is in of the old use again.

Ford v. Lord Grey,
6 Mod. 44.
Salk. 285.

§ 17. The possession of one tenant in common, or of one coparcener, is the possession of the other, nor does the bare perception of all the rents and profits by one,

Tit. 20. l. 11.
&c.
Tit. 19. l. 7.

one, amount to an ouster of the other, so as to make him liable to be barred by a fine.

Estates Tail
of the Gift of
the Crown.

§ 18. When fines became common assurances of lands, the Judges would no more allow a fine to divest the interest of the King, than any other conveyance, but preserved the King's remainder or reversion, although they allowed the fine to be a good bar to the estate tail, on which the King's remainder or reversion depended, for otherwise an estate-tail, with a remainder or reversion in his Majesty, would have been unalienable; and if a fine was levied of an estate of this kind, it only passed a base fee, determinable on failure of heirs of the body of the tenant in tail.

But by a clause in the statute 32 *Hen. 8. c. 36. f. 4.* it was provided that “ that statute should not extend
“ to any fine levied by any person or persons, of any
“ manors, lands, tenements, or hereditaments, before
“ the time of levying the same fine, given, granted
“ or assigned to the said person or persons so levying
“ the same fine, or to any of his or their ancestors in
“ tail, or by virtue of any letters patent of the King,
“ or any of his progenitors, or by virtue of any act
“ or acts of parliament, the reversion whereof, at the
“ time of the said fine or fines so levied, being in the
“ King, his heirs or successors; but that every such
“ fine and fines should be of like force, strength, and
“ effect, as they were or should have been if that act
“ had never been had or made.”

In consequence of this proviso the operation of fines levied by tenants in tail, where there was a remainder or reversion in the crown, depended on the statute 4 *Hen. 7.* and it was much doubted whether the issue in tail were barred or not. But on account of a statute made two years after, 34 & 35 *Hen. 8. c. 20.* it was resolved that no fine, levied by a tenant in tail, of the King's gift, &c. where there was a remainder or reversion in the crown, should operate as a bar to the issue in tail, or should affect the remainder or reversion which was in the crown.

1 Inst. 372 b.
T Raym.
349.
Sir T. Jones
252.

With respect to the construction of the statute 34 & 35 *Hen. 8.* and the cases which have been determined on it, they will be stated in the Essay on Recoveries.

19. A springing or shifting use cannot be defeated or destroyed by a fine levied of the estate out of which such springing or shifting use is to arise, unless there be a non-claim of five years after it arises. Thus, in the case of *Lloyd v. Carew*, which has been stated in a former title, it appeared that *Richard Carew* and *Penelope* his wife, in order to extinguish and destroy all such right as the heirs of *Penelope* might have under the proviso, and for settling the same on the said *Richard Carew* and his heirs, levied a fine of all the estate, and declared the uses thereof to *Richard Carew* for life, remainder to *Penelope* for life, remainder to *Richard Carew* in fee. *Richard Carew* died without issue, upon which the heirs of *Mary* claimed the estate under the proviso, and filed their bill in Chancery, to compel the trustees to convey the estate

Springing and
Shifting Uses.

Vide Tit. 16.
ch. 5. f. 30.

estate to them, on payment of the 4000 *l.* The bill was dismissed; but upon an appeal to the House of Lords, the decree of dismissal was reversed, it being alledged that this proviso was within the same reason with those limitations which were allowed in the Duke of *Norfolk's* case, where it is said that future interests, springing trusts, or trusts executory, and remainders to arise upon future contingencies, are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will speedily wear out. And that the fine could not bar the benefit of this proviso, because the same never was nor could be in *Penelope*, who levied the fine,

Dignities.
Tit. 26.
f. 121, 122.

§ 20. A dignity or title of honour cannot be barred or surrendered by fine, as has been already stated.

TITLE XXXV.

FINE.

CHAP. XIV.

How Fines may be reversed and avoided.

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| <p>§ 1. <i>Writ of Error.</i>
 5. <i>Who may bring a Writ of Error.</i>
 25. <i>Writ of false Judgment.</i>
 26. <i>Writ of Deceit.</i>
 31. <i>Motion.</i></p> | <p>§ 33. <i>Modes of avoiding the Effects of a Fine.</i>
 34. <i>Attion.</i>
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 60. <i>Averment of Fraud.</i>
 64. <i>Courts of Equity.</i></p> |
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Section 1.

A FINE being considered as a judgment given in a court of record, it can only be reversed by a writ of error, which is also a matter of record, being a commission to judges of a superior court, authorising them to examine the record upon which a judgment was given, and, on such examination, to affirm or reverse the same according to law.

Writ of Error.

§ 2. During the term in which a judicial act is done, the record may be amended or invalidated, without a writ of error, because, during the term, the record is in the breast of the court, and the rolls are alterable at the discretion of the judges; and, now, the courts of justice allow amendments to be made at any time while the suit is depending, notwithstanding the record

1 Inst. 260.

3 Com. 407.

be

be made up, and the term be past; for they consider the proceedings as in *fiel* until the judgment is given; so that a fine may now be amended or invalidated at any time during the term in which it is levied, by an application to the Court of Common Pleas.

Fitz. N. B.
21.

§ 3. A writ of error is, properly speaking, a proceeding in the nature of an appeal, and, therefore, must be brought in a superior court; so that a writ of error to reverse a fine is usually brought in the Court of King's Bench, because that court has an appellant jurisdiction over the Court of Common Pleas. But where the error assigned in a judgment does not arise from any fault in the court, but from some defect in the execution of the process, or from some matter of fact, the writ of error must be brought in the same court in which the judgment was given. And, therefore, in cases of this kind, a writ of error to reverse a fine must be brought in the Court of Common Pleas.

§ 4. With respect to fines levied before the justices of *Wales*, pursuant to the statute 34 and 35 *Hen. 8.* it is provided by that statute, s. 113. that all errors therein shall be redressed by writ of error, to be sued out of the King's Chancery in *England*, returnable before the King's Justices of his Bench in *England*. And by the statute 43 *Eliz. c. 15. s. 6.* it is provided, that all fines levied in the county of the city of *Chester* pursuant to that act, shall be subject to be reversed upon writs of error to be sued and prosecuted before the High Justice of the county palatine of *Chester*, as other judgments given in the Portmoot Court.

§ 5. With

§ 5. With respect to the persons who may bring a writ of error, it should be premised, that no person has a right to reverse a fine, unless he can shew that, upon such reversal, he will be entitled to the land; for the courts of law will not dispossess the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title, until the contrary appears. Besides, if the person who demands the reversal of the fine, cannot prove that he has a title to the lands of which the fine was levied, it follows, that he is not affected by it; and it would be trifling with courts of justice, for a person to seek relief, who cannot make it appear that he has received an injury.

Who may
bring a Writ
of Error:
Roll. Ab.
Tit. Error
(K.)

§ 6. The person, therefore, entitled to a writ of error to reverse a fine, is he who would have been entitled to the lands if the fine had not been levied, which, in general, is the heir at law; but where one who is seised *ex parte materna*, levies a fine in which there is error, the heir *ex parte materna* will be entitled to the writ of error. The younger son, when entitled to the lands by the custom of Borough *English*, shall have the writ of error, and not the heir at common law, for this remedy descends with the land. A brother of the half-blood, however, is not entitled to bring a writ of error on a fine levied by his elder brother, though, if there had not been such fine, the land would have descended to him.

Dyer 90 a.

1 Leon. 261.

Idem.

1 Inst. 14 a.
n. 6.

§ 7. In a writ of error to reverse a fine, it is not requisite, that the person who brings the writ should de-

Champernoon
v. Godolphin,
Cro. Jac. 150.

duce

duce his title and pedigree, unless it be a special case varying from the common course, as, where a writ of error is brought by a special heir in tail, or a person in remainder.

1 Roll. Ab.
747.

§ 8. All those who are parties to a fine, must, in general, join with the person entitled to the land in reversing it; but this rule admits of some exceptions.

Piggot v.
Harrington,
Cro. Eliz.
115.

§ 9. Husband and wife were tenants for life, with remainder to an infant in fee, and they all joined in levying a fine. The infant alone brought a writ of error to reverse it, on account of his nonage. It was objected, that since all had joined in the fine, they should likewise join in the writ of error: that the husband and wife should be summoned and served, and then the infant alone might proceed to assign errors. But it was adjudged that the writ of error was well brought by the infant alone, because the error assigned was not in the record, but without it, *viz.* in the person of the infant.

5 Rep. 39 b.

§ 10. No person can have a writ of error to reverse a fine, who took any estate by it, because no recoveror can bring a writ of error to defeat a record, by which he himself has recovered; for the judgment in a writ of error is, to avoid that which the plaintiff has lost. It follows, from this principle, that in a *fine sur done grant et render*, the cognizor cannot assign error in the *grant et render*, by which he himself has taken an estate.

Idem.

§ 11. A writ of error to reverse a fine, must be brought against some one of those who were parties or privies to it, and not against the tenant of the land only. But the court will not, in general, reverse a fine, unless a *scire facias* is returned against the persons who are then in possession; for the cognizees of a fine are frequently nothing more than trustees, and have no beneficial interest in the lands.

1 Salk. 339.
Rep. Temp.
Holt, 614.

§ 12. Although it is a rule, that in actions for the recovery of dower, the parol shall not demur on account of the infancy of the heir; yet if a man and his wife levy a fine, and, after the husband's death, the wife brings a writ of error to reverse it, in order to recover her dower, the heir may plead his infancy, and the parol shall demur.

§ 13. In error to reverse a fine levied by the plaintiff and her husband, the heir being summoned as terretenant, appeared and pleaded that he was within age, and prayed that the parol might demur. The plaintiff counter-pleaded the age, shewing that she was entitled to have dower before the fine levied, and was now barred of dower by the fine which was erroneous, and set forth the errors. Upon demurrer and solemn argument, it was adjudged, that the parol should demur, and that the plaintiff should not have the advantage to take from the defendant his age, having by the fine, so long as it stood in force, barred herself of her dower; and therefore the law will rather favour the infant, whose privilege was immediate, than the plaintiffs, which was only mediate, after the fine was reversed.

Herbert v.
Binion, Cro.
Jac. 392.

1 Roll. Ab.
757.

§ 14. Errors may be assigned either in fact, as that the cognizor to a fine was an infant, or else in law, that is, on account of some defect appearing on the face of the record. But nothing can be assigned for error in fact, in a fine which contradicts the record, because the records of a court of justice are of so great credit, that they can only be defeated by matters of equal notoriety with themselves; and, therefore, although the circumstances assigned for error, should be proved by witnesses of the greatest credit, yet such evidence cannot be admitted. Thus, we have seen, that where the entry of the king's silver before the death of the cognizor, appears upon record, no averment against it can be made.

Ante Ch. 2.
f. 54.

Dyer 89 b.

§ 15. No averment can be made, that the cognizor of a fine died before the *teste* of the writ of *dedimus potestatem*, when it appears by the certificate of the concord that he was alive, for this contradicts the record. But an averment of the death of the cognizor generally, before the engrossment, entry, and recording of the king's silver, is admissible.

Wright v.
Mayor of
Wickham,
Cro. Eliz.
468.

§ 16. Where a fine is acknowledged in court, the plaintiff in error cannot assign for error that the cognizor died before the return of the writ of covenant, for that would directly contradict the record, because no fine is ever acknowledged in court, until the writ of covenant is returned; for, until then, the parties are not before the court. But if the fine is acknowledged before commissioners, it may then be averred, that the cognizor died before the return of the writ of covenant,

or that, after the acknowledgment, and before the return of the certificate thereof, the cognizor died; because these facts are consistent with the record.

§ 17. A fine was acknowledged before *Roger Manwood* Esq: one of the justices of the Common Pleas, and, afterwards, a writ of *dedimus potestatem* was directed to Sir *Roger Manwood*, (he having been knighted after the fine was acknowledged) who returned it with his name and title: this circumstance was assigned for error, but it was not allowed, because it contradicted the record, by which it appeared that the writ of *dedimus potestatem* was directed to Sir *Roger Manwood*, who, by virtue thereof, took the acknowledgment.

Arundel v.
Arundel;
Cro. Eliz.
677.

§ 18. A person may bar himself from bringing a writ of error in several ways; thus, if a man releases all his right in, or makes a feoffment of, the land whereof a fine has been levied, he will be thereby barred from bringing a writ of error, because, by his release or feoffment, he has for ever excluded himself from the land; and no person can have a writ of error who is not entitled to the land. But if a person releases his right in, or makes a feoffment of, part of the land, he may still reverse the fine as to the remainder.

1 Roll. Ab.
788.

§ 19. If an infant brings a writ of error to reverse a fine levied by him during his infancy, and, on inspection, his nonage is recorded by the court, but before the fine is reversed, he levies another fine, the second fine will prevent him from reversing the first, because

Hart's Case,
id.

the second fine having entirely barred him of all right to the lands, must also deprive him of all remedies to recover them.

Cockman v.
Farrer,
T. Raym.
461.
T. Jones 181.

§ 20. In a writ of error to reverse a fine, the defendant cannot plead in bar the same fine which is attempted to be reversed, and five years non-claim, *quia non valet exceptio istius rei cujus petitur dissolutio*.

Barton v. Le-
ver & Brown-
low, Cro. Eliz.
388.

§ 21. A common recovery will bar the issue in tail from bringing a writ of error to reverse a fine levied by his ancestor, because the estate tail being barred by the recovery, the issue in tail has no title to the land.

Fazakerly v.
Baldo, Salk.
341. 13 Vin.
Ab. 338.

§ 22. The manner of reversing fines differs from that which is observed in reversing other judgments, for, in those cases, the record itself is removed into the court in which the writ of error is brought, because in adversary suits, errors cannot be assigned on a transcript of a record only : but, in cases of fines, nothing more than the transcript is removed, on which the errors are assigned ; and if the fine is erroneous, the Court of King's Bench may send for the record itself and reverse it, or else send a writ to the treasurer or chamberlain of the Court of Common Pleas to take it off the file.

1 Rep. 76 b.
1 Roll. R. 11.
3 Lev. 36.

§ 23. It is said by Lord Coke and others, that if there be tenant for life, remainder in fee to an infant, and they both join in levying a fine, which is afterwards reversed by the person in remainder on account of his infancy, yet that the cognizee shall have the lands dur-

ing the life of the tenant for life. But, in the case of *Ld. Raym.*
Zouch v. Thompson, it was adjudged, that although a ^{179.}
 fine might be reversed as to part of the lands, and remain
 good as to the residue, yet that a fine could not be re-
 versed *in toto* as to one person, and remain good *in toto*
 as to another.

§ 24. By the statute 23 *Eliz.* c. 3. f. 2. it is enacted,
 “ That no fine shall be reversed for false or incongru-
 “ ous *Latin*, rasure, interlining, mis-entering of any
 “ proclamations, mis-returning or not returning of the
 “ sheriff, or want of form in words and not in sub-
 “ stance.” And, by the statute 10 and 11 *W.* 3. c. 14.
 a writ of error to reverse a fine must be brought and
 prosecuted within 20 years after such fine levied. Vide Tit. 36.
C. 14.

§ 25. A writ of error can only be brought to reverse
 a judgment in a court of record ; for, to amend errors
 in a base court, which is not of record, a writ of false
 judgment lies, returnable in the Court of Common
 Pleas. Writ of false
Judgment.
1 Inst. 288 b.

§ 26. Where a fine is levied in the Court of Com-
 mon Pleas, of lands held in ancient demesne, the lord
 may reverse it by writ of deceit ; and such writ may be
 brought by the lord against the parties to the fine and
 the *cestui que use*, by means of which, he shall obtain
 judgment not only for damages, (which are usually re-
 mitted), but also to recover his court and jurisdiction
 over the lands, and to annul the former proceedings. Writ of
Deceit.
Fitz. N. B.
98. 2 Inst.
216. Rex v.
Mead, 2 Willf.
R. 17. Com.
R. 126.

Anon. & Leon.
299.

27. If a fine be levied of lands, whereof part are held in ancient demesne, and part frank-fee, and the lord in ancient demesne brings his writ of deceit, the Court of King's Bench, upon a view of the transcript of the record, and proof that part of the lands are ancient demesne, will reverse the fine as to that part. They will not, however, order the fine to be taken off the file, as in cases where the whole fine is reversed, because it will remain good as to the lands which are frank-free, but will order a mark to be made on the fine, to shew that it is cancelled, as to the lands held in ancient demesne.

§ 28. The lord of a manor, held in ancient demesne, is not barred of his writ of deceit by the death of any of the parties to the fine.

Zouch v.
Thompson,
1 Ld. Raym.
177.

§ 29. A writ of deceit was brought by the lord of a manor held in ancient demesne, to avoid a fine levied of lands held of him as of the said manor. It was argued for the defendant, that the cognizor and the cognizee being both dead, the lord could not now maintain an action of deceit, because it was only a personal action, and, therefore, died with the person. But it was resolved that a writ of deceit did lie in such a case, against the heir of the cognizor or cognizee, because it was a real deceit, and did not resemble the personal deceit of non-summons; and if the law were otherwise, the lord of a manor, held in ancient demesne, would be for ever barred of his right of inheritance, in case the parties to such a fine should happen to die the day after it was levied.

§ 30. Where

§ 30. Where a fine levied in the Court of Common Pleas, of lands held in ancient demesne, is reversed by writ of deceit, it is said to be doubtful, whether the fine shall still hold good between the parties. Some say it does not become entirely void, nor is the cognizor restored to his land against his own solemn acknowledgment on record; especially since the lord who brings the writ of deceit seeks nothing more than to restore the land to the privileges of ancient demesne. Others hold, that the writ of deceit, and the reversal thereon, entirely avoids the fine, and restores the cognizor to the possession of the land; for the cognizance, though on record, shall be no estoppel, because it was made in a court which had no jurisdiction, and, therefore, the whole proceedings were *coram non judice*.

Cro. Eliz.
471.

§ 31. In some cases, the Court of Common Pleas will vacate and set aside a fine upon motion, although the king's silver has been paid, and the fine completed, without putting the parties to the trouble and expence of a writ of error; in the same manner as they would set aside a judgment obtained by trick or surprise.

Motion,
2 Show. Rep.
281.

§ 32. Thus, where it evidently appeared to the Court, that a husband had prevailed on his wife to levy a fine, she being but sixteen years old; the fine was vacated, and the exemplification brought into court and delivered up; the commissioners were also ordered to be prosecuted.

Hutchinson's
Case, 2 Lev.
36

Watts v. Bir-
kett, ante.

§ 33. Although a fine can only be reversed by a writ of error, yet its effects may be avoided in several other

Modes of
avoiding the
Effects of a,
Fine.

Flowd. 359.
2 Inst. 518.
2 Black. Rep.
994.

other ways. There were four modes of avoiding a fine at common law, two by matters of record, and two by acts *in pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied; and an entry of a claim on the record of the foot of the fine itself, in this manner, *talis venit et apponi: clameum suum*. Those by acts *in pais* were, a lawful entry upon the land by the person who had a right; and, in case that could not be done, then a continual claim.

Action.
Brasier's
Case, 2 Leon.
53.

§ 34. By the statute 4 *Hen.* 7. all those who are affected by a fine, must pursue their title by way of action or lawful entry; so that a claim entered on the record of a fine, would now be ineffectual. An action commenced within five years after a fine has been levied, will be sufficient to avoid it, although judgment be not obtained within seven years after. But such action must be prosecuted with effect, for, if an action be commenced within the time prescribed, and afterwards discontinued, it will not avoid a fine.

1 Vent. 45.

Fitzhugh's
Case, 2 Leon.
221.

§ 35. The suing out of a writ, and delivering it to the sheriff, does not amount to a pursuing of a claim or title by way of action, unless the writ be returned by the sheriff.

Comb. 249.
f. 38.

§ 36. The action mentioned in the statute 4 *Hen.* 7. must be a real action; so that an ejectment will not avoid a fine.

§ 37. A bill in Chancery is not such a claim under the statute 4 Hen. 7. as will avoid a fine. There is, however, an exception to this rule, in the case where a fine has been levied of a trust estate, because no entry by the *cestui que trust*, nor claim or other legal act, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim; it can only be by bill in Chancery, as the claim to avoid a fine ought to be of a nature which corresponds with the estate.

1 Chan. Ca.
268—278.
2 Bl. Rep.
994

§ 38. A fine may also be avoided by an actual entry made on the lands whereof the fine has been levied, provided the person who seeks to avoid the fine has a right of entry; but if the right of entry be taken away and a right of action only remains, as, where a fine operates as a discontinuance of the estate, there an actual entry on the land will not avoid the fine, but a real action must be brought.

Entry.

1 Vern. 213.

§ 39. Where an estate tail is discontinued, the estates in remainder and reversion expectant thereon are divested, and the persons entitled to such estates are barred of their entry, and driven to their action.

1 Inst. 332 b.
1 H. Black.
Rep. 269.

An estate tail may be discontinued by five different modes of conveyance. A feoffment, fine, recovery, release, and confirmation with warranty. But no person can create a discontinuance, who is not in the actual possession of the estate tail by force of the intail.

1 Inst. 325 a.

Tit. 2. c. 2.
f. 14.

§ 40. Where the original conveyance of an estate is not by fine, but it is only levied as a confirmation of some

some prior conveyance, it will not, in that case, operate as a discontinuance, or take away the entry of the remainder-man.

Seymour's
Case,
10 Rep. 95.

§ 41. Lord *Cheney* being tenant in tail, with remainder in tail to *John Cheney*, Lord *Cheney* conveyed the premises, by bargain and sale inrolled, to *William Higham* and his heirs, by force whereof he entered and was seised, and, in a year afterwards, he levied a fine with proclamations to the said *Higham* and his heirs, with general warranty. Lord *Cheney* died without issue, and *John Cheney*, the remainder-man in tail, entered upon the premises. The question was, whether his entry was lawful or not? It was resolved, that the entry of *John Cheney* was not taken away by the fine, because it did not discontinue the estate tail, but only operated as a confirmation of the estate of the bargainee, which was originally determinable on the death of the tenant in tail; whereas the fine confirmed it as long as the tenant in tail had heirs of his body. It was agreed, that if the fine had been levied before the bargain and sale was executed, it would have discontinued the estate tail, and divested the remainder and reversion, by which means, the entry of *John Cheney* would have been taken away; but the estate-tail not being discontinued, the remainder was not divested or turned to a right, so that *John Cheney* still continued in possession of it, and, therefore, the fine was no bar to him.

§ 42. But where a fine is levied in pursuance of a covenant in a prior conveyance of an estate-tail, as where

where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly; in that case, the lease and release and fine will be considered as one assurance, and will therefore operate as a discontinuance of the estate tail.

§ 43. A person being tenant in tail-male, with remainder over in fee, in consideration of a marriage, conveyed his estate tail by lease and release to trustees and their heirs, to several uses, and, in the release, he covenanted to levy a fine to the same uses. The marriage took effect, and the tenant in tail levied a fine pursuant to his covenant. On the death of the tenant in tail without issue, the remainder-man in fee made an actual entry upon the lands to avoid the fine, and then brought his ejectment. The question was, whether the plaintiff would maintain an ejectment? It was contended, that an ejectment might be maintained, unless a discontinuance could be proved; that, from the authority of *Seymour's* case, the fine did not operate as a discontinuance, because it passed no freehold, the freehold having been conveyed by the lease and release before the fine was levied, which, therefore, only operated as a confirmation of the preceding estate. But the Court of King's Bench were unanimously of opinion, that the lease and release, and fine, operated as one assurance, and divested the remainder in fee; so that the plaintiff could not maintain his ejectment, but was put to his former condition, because the operation of the deeds and fine ought not to be divided and considered distinctly, as that would defeat the intention of the parties, and overturn a great number of family settlements; that the deeds

*Doe ex dem
Odiarne v.
Whitehead,
2 Burr. 704*

of lease and release were incomplete until the fine was levied, and only operated as a declaration of the uses of the fine, so that the estate tail passed by the fine; that this case was quite different from *Seymour's*, for, in that case, Lord *Cheney* did not levy the fine until a year after the bargain and sale was inrolled; and it was expressly found by the verdict that the bargainee entered, and was seised by force of the bargain and sale only; so that the bargain and sale was totally unconnected with the fine, nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

1 Inst. 332 b. § 44. It should, however, be observed, that there can be no discontinuance of things lying in grant; so that, if a tenant in tail of a rent, advowson or common, levies a fine, or makes a feoffment with warranty, there is no discontinuance, for nothing passes but during the life of the tenant in tail, which is lawful; and as no injury is done to the issue in tail, the remainder-man, or the reversioner, there is no discontinuance.

1 Saund. R. 319. n. 1. § 45. A fine levied by a tenant for life, operates so as to displace or divest the remainders and reversion, and, therefore, only leaves a right of entry in the persons entitled to the remainder or reversion; from which, it follows, that they must make an actual entry to avoid such fine. But, where a tenant for life accepts a fine from a stranger, it has no operation, and the remainder-man or reversioner is not bound to enter, but may avoid it by the plea of *partes finis nichil habuerunt*.

§ 46. With respect to the mode of making an entry it must be on the land, and with an intention of claiming the freehold against the fine.

§ 47. A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question, he said to the tenant, he was heir to the house and land, and forbade him to pay more rent to the defendant; but he did not enter into the house when he made the demand, on which it was agreed that the claim at the gate was not sufficient. Then it was proved that there was a court before the house, which belonged to it, and that though the claim was at the gate, yet it was on the land and not in the street, and that was holden good without question.

Anon.
Skin. 412.

§ 48. If a person is prevented by force or violence from entering on lands whereof a fine has been levied, he must then make his claim as near the land as he can, which in that case will be as effectual as if he had made an actual entry.

Lit. f. 419.
1 Inst 253 b.

§ 49. The delivery of a declaration in ejectment does not amount to such an entry as will avoid a fine, even though the defendant appears to it, and confesses lease, entry, and ouster, for there must be an actual entry made *animo clamandi*: whereas in an ejectment, there is only a fictitious or supposed entry, for the purpose of making a demise, and an actual entry must be made before the time when the demise is laid.

3 Burr. Rep.
1897.
Doug. Rep.
468.

Berrington v.
Parkhurst,
2 Stra. 1086.
Andrews 125.
4 Brown's
Ca. in Parl. 85.

§ 50. Upon a special verdict in ejectment, it was found that a fine had been levied of the premises in question; and that the lessor of the plaintiff entered into the premises with intent to make the demise in the declaration mentioned, but did not then make an actual entry for the purpose of avoiding the fine, but that after the demise laid the lessor of the plaintiff made an actual entry. It was insisted for the defendants, 1st, That an actual entry was necessary to avoid the fine. And 2d, That the demise could not be laid before the lessor had regained the possession by the actual entry. The court was of opinion with the defendants on both these points; and on a writ of error in the House of Lords it was argued for the plaintiff, that a fine with proclamations does not, by force of the statute 4 Hen. 7. operate as a bar to conclude strangers till after five years elapse without entry or action; and therefore the verdict having found that the lessor of the plaintiff made his first actual entry after the demise laid, he thereby avoided the operation of the fine, and was at liberty to lay the demise in his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued, in the same manner as if his title had stood independent of such fine, so rendered ineffectual within the plain intent of the statute: and if such entry was not good to maintain this demise, it must follow, that in every case where a fine is levied by a wrong-doer, and not discovered till two, three, or four years afterwards, the intermediate profits between the time of levying such fine, and the entry of the lawful owner, must be absolutely lost, although the statute gives five years to enter,

enter, and an entry at any time within the five years, purges the disseisin and the wrong from the beginning, and brings the person so entering within the saving of the statute, to all intents and purposes. On the other side it was said, that an actual entry is necessary to avoid a fine, before an ejectment can be brought, and it must also be before the time of the demise; because a fine is of that high nature, even at common law, that it dispossesses all persons claiming title, and consequently a lease to found the ejectment upon, cannot be made till the lessor regains the possession. As to the entries found by the verdict to have been made subsequent to the time of the demise, they were of no use in the present case; for the ejectment being originally void, could not be made good by any subsequent act; and therefore whatever effect those entries might have in other respects, they could not make the lease good. That the word *action* in the statute 4 Hen. 7. has always been understood to mean real actions which were then in use: and it has often been determined, that the bringing an ejectment is not sufficient to avoid a fine.

It appears from Sir John Strange's report of this case, that the questions put to the Judges were, 1st, Whether an actual entry was necessary to avoid a fine? 2d, Whether the demise being laid before the time of the first entry, the ejectment could be maintained? To the first question they answered in the affirmative; to the second in the negative; upon which the judgment was affirmed.

S. P. Doug.
484.
7 Term Rep.
732.

2 Will. R. 45.

§ 51. No entry is necessary where the fine is levied without proclamations, for the statute *4 Hen. 7.* does not extend to such a fine, and therefore it may be avoided at any time within twenty years.

1 Inst. 258 a.

§ 52. The entry to avoid a fine must be made by the person who has a right to the land, or by some one appointed by him; for a person who has a right of entry may empower another to enter for him. But if a stranger makes an entry on lands whereof a fine has been levied, in the name of a person who has a right to the land, without any preceding command or subsequent assent, within five years, by the person having right, it will not be sufficient; for the statute *4 Hen. 7.* bars all persons who do not claim within five years, by which means an election is given to all those who have a right at the time when a fine is levied to claim or not, and a stranger cannot make this election for them.

Pollard v. Luttrell, Poph. 108. Moor 457. 9 Rep. 106 a. Cro. Eliz. 561.

§ 53. A disseisor levied a fine with proclamations, the disseisee not knowing it; and a stranger made an entry within five years, to the use of the disseisee, but the disseisee did not assent to it, until the five years were expired. It was determined by all the Judges that the assent of the disseisee to the entry, after the five years had expired, was not sufficient to render it valid, because the statute of fines ought to be taken strictly, being made for the purpose of repose and tranquillity.

§ 54. A person

§ 54. A person in remainder or reversion, expectant on a lease for life or years, or the lord of a tenant by copy, may enter in the name of the tenant for life, the tenant for years or the copyholder, to save those particular interests, as well as their own freehold and inheritance: and the entry of those particular tenants will also save the rights of the lord, the remainderman, or reversioner, on account of the privity of estate which is between them. A guardian by nurture, or in socage, may also enter in the name of his ward to avoid a fine, and such an entry will save his right.

Shep. Tou.
33, 34.
9 Rep. 106 a.

§ 55. The entry of one joint-tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in common,

§ 56. By the statute 4 *Ann. c. 16. s. 16.* it is enacted, “ That no claim or entry to be made of, or
“ upon any lands, tenements, or hereditaments, shall
“ be of any force or effect to avoid any fine levied, or
“ to be levied with proclamations, according to the
“ form of the statute in that case made and provided,
“ in the Court of Common Pleas, or in the Courts
“ of Sessions in any of the counties palatine, or in
“ the Courts of Grand Sessions in *Wales*, of any
“ lands, tenements, or hereditaments; or shall be a
“ sufficient entry or claim within the statute of limita-
“ tions, unless upon such entry or claim an action
“ shall be commenced within one year next after the
Vol. V. R “ making

“ making of such entry or claim, and prosecuted with
“ effect.”

Plea.

§ 57. The proper mode of reversing a fine for any defect in the record^a is, we have seen, by writ of error: but where a fine is void *ab initio*, either as to all mankind, or as to some particular persons, its effects may then be avoided by plea.

Dyer 215 b.
Co. Read. 12.
2 Inst. 523.

§ 58. Thus, where none of the parties to a fine have an estate of freehold in the lands whereof it is levied, such fine is totally void as to all strangers, and may be avoided by pleading, *quod partes finis nec eorum aliquis tempore levationis finis, nihil habuerunt, nec eorum aliquis habuit, &c. sed quidam J. S. cujus statum ipse habet.* This mode of avoiding a fine seems to have been already established in the time of Brac-

Braet. 436 b.

ton: *Excusatur etiam qui quod clamcum non apposuerit, scilicet ubi finis ipso jure sit nullus, ut si factus fuit de tenemento quod alius tenuit, ut si ipse qui debuit clamcum apposuisse, vel antecessor suus, fuit in seifina de eadem re quando finis factus fuit, et non ille vel antecessor suus qui finem allegat.*

Rot. Parl. v.
2. p. 122.

§ 59. The plea *quod partes finis nihil habuerunt*, might originally have been pleaded by any person who was not a party to the fine; and there is a very long case in the Rolls of Parliament, 14 Ed. 3. N° 31, in which it was determined, that a stranger should be allowed this averment. But by the statute 4 Hen. 7. parties and also privies to a fine are deprived of this plea; and as it is now determined, that the issue in

tail are meant by the word privy, it follows, that they cannot avoid a fine on this ground.

§ 60. By the common law a fine might be avoided on account of any fraud in the parties who levied it. *Averment of Fraud.*
Excusatur etiam quis quod clameum non apposuerit, si finis factus fuerit per dolum et fraudem vel alio modo in alterius præjudicium, quod finis tenere non debeat. *Braet. 436 b. 437 a.*

§ 61. Thus, in 29 Eliz. one *Hubert* was convicted in the Star Chamber upon a bill exhibited against him for procuring one *Webster* to acknowledge a fine, in the name of *Alexander Gillibrand* (who was then beyond sea). The sentence was, that he should be fined and imprisoned, and that the fine thus levied should be avoided (if it could be so done) by entering a vacat on the roll, or otherwise as the Justices of the Common Pleas should best approve; and if it could not be so made void, that then *Hubert*, by fine or otherwise, as *Gellibrand* might devise, should re-convey the land to him and his heirs. *Hubert's Case, Cro. Eliz. 531. 12 Rep. 123. 5 Rep 68 b. Co. Read. 7.*

§ 62. Soon after the restoration, doubts were entertained respecting the power of Parliament to set aside a fine obtained by force and fraud.

A bill having been brought into the House of Lords to vacate certain fines unduly procured to be levied by Sir *Edward Powell* and *Dame Mary* his wife, the House commanded the Judges to deliver their opinions thereon in point of law: the Lord Chief Justice of the King's Bench delivered it as his opinion, and that

Lords Jour. v. 11. p. 191. 12 Car. 2.

of all the rest of the Judges, to be, "That they did not find by any record or precedent in their law books of any fine which had been perfected, that had been vacated for fraud or force in Parliament, or any other place." The question was then put, whether the fine was obtained by force? and it was resolved in the affirmative. The bill passed, but the following protest was entered, signed by Lord Chancellor *Hyde* and several other Lords, "That fines are the foundations of the assurances of the realm, upon which so many titles depend, and therefore ought not to be shaken, nor hath there any precedent occurred to us wherein any fines have been vacated by judgment or act of Parliament, or otherwise without consent of the parties; the eye of the law looking upon fines as things always transacted by consent, and with that reverence, that no averment whatsoever shall be against them when they are perfected." In the House of Commons counsel were heard for and against this bill, and the House being satisfied that they had full power and jurisdiction of the cause, the bill passed.

Id. pa. 209.

Commons
Jour. vol. 8.
pa. 344.
13 & 14 Car.
2. c. 27.

3 Rep. 80 a.
Shep. T. 18.
Jenk. 254.

§ 63. A fine may also be avoided by an averment of fraud, in consequence of the statute 27 *Eliz.* c. 4. where it appears to have been levied to secret uses, for the purpose of deceiving purchasers; or by an averment of usury under the statute 13 *Eliz.* c. 8.

Courts of
Equity.

§ 64. Although a fine duly levied is as effectual and binding in a court of equity as in a court of law, because it is one of the common assurances

of the realm, and was originally instituted for the purpose of securing those who were in possession of lands; yet if any fraud or undue practice appears to have been used in obtaining a fine, the Court of Chancery has then a power of relieving against it, as much as against any other conveyance; for although it might be extremely improper and inconvenient to admit of an averment in a court of common law, against a fine obtained by fraud, because it would be dangerous to permit the evidence of a record to be questioned in any case whatever; yet as there is a method in which relief may be given in cases of this kind, without contradicting the principles of the common law, it is highly proper that a court of equity should adopt it, and the Lord Chancellor appears to have exercised this jurisdiction as early as the reign of Queen *Elizabeth*.

Day v.
Hungate,
1 Roll. Rep.
115.
Welby v.
Welby,
Tothill 99.
13 Vin. Ab.,
373.

§ 65. The Court of Chancery however does not absolutely set aside a fine so obtained, nor does it send the party aggrieved to the Court of Common Pleas to get it reversed; but it considers all those who have taken an estate by such a fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a re-conveyance of the lands, on the general ground of laying hold of the ill conscience of the parties, to make them do that which is necessary for restoring matters to their situation. But with respect to any technical error in a fine, or irregularity of the commissioners who have taken the acknowledgment of it, it is a matter only cognizable in the Court of Common Pleas, because a fine being of the same na-

Wright v.
Booth,
Tothill 101.
St. John v.
Turner,
1 Ab. Eq. 259.
1 Vezey 289.

ture as a judgment, is properly examinable in that court only where it is entered.

Coleby v. Smith,
1 Vern. 205.

§ 66. A bill was filed by one *Coleby*, to be relieved against a purchase made from the plaintiff's father, suggesting that he had been circumvented and imposed upon by the defendants. The defendants insisted on their purchase, and it appeared that there were, first, articles for the purchase under hand and seal, and some time after that, a conveyance actually made and executed in pursuance of these articles, and the purchase-money paid and secured; and after all this, a fine levied by the plaintiff's father to the purchaser. Lord Keeper *North*, upon the hearing of the cause, set the purchase aside, because there appeared to be some art used to persuade the plaintiff's father to sell the lands.

Woodhouse v. Brayfield,
2 Vern. 307.

§ 67. A person having prevailed on a woman to levy a fine of some houses, and to execute a deed declaring the uses thereof to himself and his heirs, it being proved that the woman, at the time of levying the fine, declared that she must make use of some friend's name in trust for herself, and she having afterwards declared in her will, that she only levied the fine for the better enabling her to dispose of her estate, and having devised it to J. S. subject to the payment of her debts: the Court of Chancery decreed, not only that the lands were liable to the debts of the testatrix, but also that the person to whose use the fine was declared, should convey the houses to J. S. according to the will.

§ 68. Where

§ 68. Where a fine is levied by a person who has got into possession under a forged deed, a court of equity will not allow it to have any operation. 2 Atk. 381.

§ 69. If tenants give a conditional possession only, provided they may pay their rents to a third person, until a suit is determined: a fine levied under such a possession will not in a court of equity be allowed to have any operation. Idem 390.

§ 70. By the common law, if an infant or idiot has by any neglect or contrivance been permitted to levy a fine, his declaration of the uses thereof will be good, so long as the fine remains in force; and if the fine is never reversed, his declaration of the uses will be binding and conclusive on him and his heirs for ever; because the law will not presume that a fine, which is a solemn act on record, has been levied by a person labouring under such disabilities, and therefore until the fine, which is the principal, is annulled, the declaration of the uses thereof will remain good. Thus, stands the common law on this point; but as the Court of Chancery has, in many instances, compelled persons who had obtained estates under a fine in a fraudulent manner, to re-convey them to those who were really intitled thereto: so, that court will interpose its authority in cases of this kind, and not suffer the declaration of uses of a fine levied by an idiot to bar his heirs; as no species of fraud can be more evident, than that of obtaining a conveyance from a person of this description. 2 Rep. 58 a. 10 Rep. 42 b. 12 Rep. 124. Hobart 224. 1 Vezey 304. Rushley v. Mansfield, Tothill 42.

Addison v.

Dawson.

2 Vern. 678.

2 Vef. 403.

3 Atk. 313.

Thus, where one *Addison* by a first and second inquisition was found a lunatick in 1706 from the year 1689, without any intervals. The defendant had got a mortgage, and at last an absolute purchase at great undervalue, by deeds, fines, and recoveries; the court set aside the purchases.

§ 71. A court of equity will not suffer a fine and non-claim to bar any charge on lands, where the person who levied the fine had notice of such charge.

Drapers'

Company v.

Yardley,

3 Vern. 662.

§ 72. Thus, where a person to whom lands were devised chargeable with legacies, levied a fine, on which there was five years non-claim, and afterwards granted a rent-charge and mortgaged the lands. It was decreed that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have had notice of them,

§ Vern. 149.

§ 73. A fine levied by a trustee will not be allowed to affect the interest of the *cestui que trust*. Thus, in the case of *Bovey v. Smith*, the Lord Keeper put this case to Serjeant *Maynard*,—"A. seised in fee in trust for B. for full consideration conveys to C. the purchaser having notice of the trust; and afterwards C. to strengthen his own estate levies a fine. Whether B. the *cestui que trust* be not in that case bound to enter within five years? and the counsel were all of opinion, that he was not; for C. having purchased with notice, notwithstanding any consideration paid by him, was but a trustee for B. and so the estate not being displaced, the fine cannot bar."

§ 74. So in the case of *Shields v. Atkins*, Lord Hardwicke says, it would be dangerous, where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of *Lord Pomfret v. Lord Windsor*, his Lordship observed, that a court of equity would not suffer a fine levied by a trustee, to bar an equitable right: and that if a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of Parliament.

3 Atk. 563.

2 Vezey 482.
2 Atk. 631.
S. P.

§ 75. It is a principle of equity, that if a stranger enters upon an infant's estate and receives the profits, he shall be looked upon as a trustee for the infant; and that the laches of a trustee shall not prejudice the *cestui que trust*.

1 Vern. 295.
2 Vern. 342.

§ 76. Thus, where *A.* devised lands to trustees until his debts were paid, then to an infant and his heirs, the defendant entered on the estate and levied a fine; five years past; the infant brought an ejectment as soon as he had attained his full age, but was barred by the fine and non-claim. He then brought his bill in Chancery, where it was determined that although the fine and non-claim was a good bar at law, the legal estate being in the trustees who were of full age and ought to have entered, yet that the plaintiff ought not to suffer for their laches, being an infant. The court decreed the possession, and an account of profits, declaring the fine and non-claim should not run upon the

Allen v.
Sayer,
2 Vern. 305.

the trust in the infant's minority, nor he suffer for the laches of his trustee.

1 Vent. 82.
1 Lev. 272.
2 Vezey 482.

§ 77. A mortgagor cannot bar a mortgagee by a fine and non-claim : for although the mortgagee be in reality out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so, while the interest is paid : It would be against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security.

Weldon v.
Dux. Ebor.
1 Vern. 132.
2 Vern. 89.
Contra.

§ 78. A fine and non-claim by a mortgagee in possession will not, from the same principle, bar the equity of redemption. Thus, where a fine and non-claim was pleaded to a bill brought for the redemption of a mortgage, the plea was over-ruled.

Goodrick v.
Brown,
1 Chan. Ca.
49.
2 Vern. 56.

§ 79. Where a fine is levied pursuant to a decree of the Court of Chancery, for a particular purpose, that Court will not permit it to operate farther than the decree directs.

Trevor v.
Trevor, Tit.
32. ch. 25.
f. 36.

§ 80. The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine.

§ 81. The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

§ 82. *William Lord Brereton*, being seised in fee of the impropriate rectory of *Middlewich*, and of the advowson and vicarage of the said church, as appendant to the rectory, agreed with *Robert Lowe* to convey the same to him; and, in pursuance of this agreement, the said *William Lord Brereton* and *Elizabeth* his wife, and *William*, their son and heir apparent, in 1664, levied a fine *sur consuance de droit come ceo, &c.* in consideration of 1000 l. therein mentioned to be the purchase-money, in the court of the county palatine of *Chester*, to the said *Robert Lowe*, and to *Edward Minshall*, *Gabriel Hodgson*, and *John Wilson*, (who all three died in *Lowe's* life-time), and to the heirs of the said *Robert Lowe*. About the year 1702, *Samuel Lowe*, the son and heir of *Robert Lowe*, presented a clerk to the vicarage of *Middlewich*, who was instituted and inducted, and continued in possession till his death, which happened in the year 1718, when *Francis Lord Brereton*, presented his clerk to the vicarage, who was instituted and inducted. *James Lowe*, the respondent's brother, brought a writ of *Quare Impedit*, but, before the matter was determined, the incumbent died, and the respondent *Lowe* presented his clerk, who was instituted and inducted. And the appellants brought their writ of *Quare Impedit*, to recover that turn of presentation, claiming the same under a conveyance from the family of *Brereton*. The respondent *Lowe* having pleaded his title to the rectory and vicarage under

Holt v.
Lowe,
4 Brown 253.

under the purchase and fine above mentioned, the appellants, in *Easter* term 1734, exhibited their bill in the Court of Exchequer against the respondent, setting forth, that *William* Lord *Brereton* being minded to sell the glebe and tithes of the said rectory, the respondent's grandfather, who was then bailiff to Lord *Brereton*, prevailed on him, his lady and son, for some small sum of money, to sell and convey to the said *Robert Lowe* the glebe lands and tithes of the greatest part of the said parish; and other parcels of the said tithes were about the same time purchased by several other persons, and conveyed to them, and the said *Robert Lowe*, as part of the consideration for the purchase of the said tithes, agreed to take upon himself the payment of the stipend of nineteen marks to the vicar; but neither he nor his son ever pretended or insisted on any right to the advowson of the vicarage, nor ever attempted to present thereto, except in the year 1702, when *Samuel Lowe*, taking advantage of *John* Lord *Brereton*'s being then under a commission of lunacy, presented a clerk. The appellants, therefore, prayed, that the respondent might discover whether there was not some deed wherein the uses of the fine were declared, and whether a subsequent fine of particular parcels of the rectory was not levied in 1667, and deeds executed declaring the uses thereof.—In bar to this discovery, the respondent pleaded the purchase so made by *Robert Lowe* his grandfather, and the fine thereupon levied to him of the said rectory, and the advowson of the said vicarage; and also the payment of the said sum of 1000*l.* the purchase money mentioned in such fine. That proclamations were duly made on the said fine, and that no

claim

claim was made to the premises within five years next after. That the respondent, and those claiming under him, enjoyed the premises for fifty years and upwards, and insisted on the statute of limitations.

On the 9th of *November* 1734, this plea came on to be argued before the barons, when they ordered that the plea should be allowed. An appeal was then brought in the House of Lords, and, on behalf of the appellants, it was argued, that the fine insisted by the plea to have been levied to *Robert Lowe, Minshall, Hodgson, and Wilson*, was not levied with an intention to convey the rectory to the conusees for their own use, but only to clear the title to the rectory, which was then intended to be sold in parcels; and as there did not appear to be any declaration of the uses of this fine, it would, by the rules of law, result to the conusors. That the end of the bill was to discover the intent and design of the said fine, and of a subsequent fine, said to have been levied in 1667 to the said *Robert Lowe*, of divers parcels of the said rectory; and by the discovery of this second fine, and the uses of it, and the consideration of such conveyance, to shew that the uses of the first fine did result to the conusors, or at least, as to such parts of the rectory as were not particularly conveyed by the second fine, and the deeds declaring the uses of it; and, therefore, the first fine ought not to have been pleaded in bar to such discovery, without a denial of the particular circumstances charged by the bill, as an evidence of such resulting use. That the respondent, by not answering or denying the several charges in the bill, touching the second fine, and the declaration

declaration of its uses, did implicitly admit the same, and that the advowson of the vicarage was not comprized therein; and this admission was a strong evidence against him to shew, that the first fine was levied only for the purposes above mentioned, and that nothing more was intended to pass to his ancestor, than what was particularly comprized in the second fine, and the declaration of the uses thereof. That it did not appear by the plea, what was the real purchase-money of the advowson, nor that the same was paid by *Robert Lowe*, the respondent's ancestor. That the appellants and the respondent derived under the same title, and the right of the appellants to the advowson appeared from the respondent's own conveyances; the pretence, therefore, of his ancestor's being a purchaser, without any notice of the appellant's title, was without foundation. And as to the quiet enjoyment, the fine and non-claim, and the statute of limitations, set up as a bar to the discovery sought by the appellants, it was said, that as to the glebe, and such part of the tithes, parcel of the said rectory, as the respondent claimed, there might have been a long and quiet possession, nor was his title thereto at all impeached by the appellant's bill; but as to the advowson of the vicarage, the only evidence of enjoyment insisted on by the respondent, was a presentation about the year 1702, which was during the lunacy of Lord *John*; and, since that time, Lord *Francis*, his heir, presented the last incumbent, and regained the possession of the vicarage. It was, therefore, hoped, that the said plea should not bar the appellants of a full discovery of the respondent's title, but that the order for allowing the same should be reversed.

versed. On the other side, it was contended, that *Robert Lowe*, the respondent's grandfather, and under whom he claimed, was a purchaser of the rectory and the advowson of the vicarage, by the fine levied in 1664, for 1000*l.*, without any notice of any other title; and, therefore, by the known and established rules and practice of courts of equity, the respondent ought not to be obliged any further to discover or disclose his title; nor were the appellants entitled to the aid of a court of equity in respect to such title. That by the fine, proclamations, and non-claim thereupon, and by the length of peaceable possession and enjoyment, which the respondent's grandfather, father, and brother, and those claiming under them, had successively of the said advowson, under the said fine and purchase; the title under which the appellants, by their bill, claimed the same, was utterly and effectually barred and defeated both at law and in equity; and, therefore, the order for allowing the plea ought to be affirmed, and the appeal dismissed with costs. After hearing counsel on this appeal, it was ordered and adjudged, that the order therein complained of, should be reversed; and that the plea should stand for an answer, with liberty to except so far, as to oblige the respondent to discover any conveyance or conveyances made by *William Lord Brereton* and *Elizabeth* his wife, and *William Brereton* Esq. their son, or any or either of them, to *Robert Lowe*, the respondent's grandfather, alone, or jointly, with any other person or persons; and to discover any deed or deeds, declaring the uses of a fine, in the pleadings mentioned to be levied in the 16th year of King *Charles II.* or declaring the uses of

of a fine in the pleadings also mentioned to be levied in the year 1667.

§ 83. Although a bill, in equity, is not such an action as will avoid a fine, if the subject-matter of the suit be of legal jurisdiction; yet still, in some instances, the filing a bill in a court of equity, will prevent the bar arising from a fine and non-claim; and, in cases of this kind, the court will direct a trial at law, with an order, that the defendant shall not set up the fine in bar of the plaintiff's claim, upon the same principle that a court of equity sometimes directs that the defendants, in a suit at law, shall not plead the statute of limitations.

2 Atk. 389,
390.

'Pincke v.
Thornycroft,
1 Bro. Rep.
289.
4 Bro. Parl.
Ca. 9 .

§ 84. Sir *John Thornycroft* Bart. being entitled to the remainder in fee of the estates in question, expectant on the decease of his sister *Elizabeth*, the then wife of General *Handasyde*, devised the same to *Henry Forster* in fee. After the decease of Sir *John Thornycroft*, disputes arose between Mrs. *Handasyde*, who was heir at law of Sir *John Thornycroft* and Mr. *Forster*, respecting the validity of this will, which were compromised, and Mr. *Forster*, in consideration of 630 *l.*, conveyed all his interest in the estates devised by the said will to General *Handasyde* and his wife in fee as joint-tenants. Mrs. *Handasyde* survived her husband, and, having no issue, she devised among other estates, " her
" estate and manor of *Stockwell* in the parish of *Lambeth*, in the county of *Surry*, and all thereunto belonging, to *Henshaw Thornycroft*, and his heirs male,
" and appointed him her executor." Upon the death
of

of Mrs. *Handasyde*, *Henshaw Thornycroft* entered into possession of all the estates whereof she was seised, among which was a farm situated in the parish of *St. Mary Newington*, but which was not within the manor of *Stockwell*, and therefore did not pass by the will, and in *Hilary* term 1773, levied a fine and suffered a recovery of all those estates, in order to bar the entail. Previous to this, *Elizabeth Pincke* and *Ann Thornycroft*, who were the heirs at law of Mrs. *Handasyde*, filed their bill in the Court of Chancery against *Henshaw Thornycroft*, praying, that the said *Thornycroft* might set forth the dates and short contents of all the deeds, evidences, and writings in his custody or power, relating to the estates whereof Mrs. *Handasyde* died seised; and that he might likewise set forth and discover of what lands of the said Mrs. *Handasyde* he was in possession, which were not comprised in her will, and for an account of the rents and profits of the said premises received by him since the decease of Mrs. *Handasyde*, and for a delivery of all deeds relating thereto. - The defendant, by his answer, denied being in possession of any estates belonging to Mrs. *Handasyde*, but what were comprised in her will. The heirs at law soon after discovered, that the farm at *Newington* was not devised by the will, and, therefore, brought an ejectment for the recovery of it. Notice of trial having been given just before the summer assizes 1778, a few days before the trial was to come on, the solicitor for the defendant informed the solicitor for the plaintiff of the will of Sir *John Thornycroft*, and that the production of that will, and setting up the title of *Henry Forster* under it, would nonsuit the plaintiff in ejectment.

ment, but did not mention the fine or the deed by which *Forster's* title was conveyed to Mrs. *Handasyde*, that deed being in fact not then discovered. The heirs at law gave notice of trial for the *Lent* assizes 1779, when *Henry Thornycroft* set up the fine and non-claim; and there having been no actual entry, the plaintiffs were nonsuited. Upon this, the plaintiffs filed a bill of revivor and supplement, praying, that under these circumstances, the defendants might be restrained from setting up the fine in any manner to the prejudice of the plaintiffs. The case was heard before the Lords Commissioners, *Loughborough*, *Ashurst*, and *Hotham*; and on behalf of the plaintiffs it was contended, that they should have proceeded to trial at the Summer assizes 1778, which was before the expiration of the five years, if they had not been prevented by the information of the solicitor; and, therefore, this was a proper case for the interference of a court of equity. They insisted further, that the filing of the bill in the Court of Chancery was of itself sufficient to prevent the bar, arising from the fine and non-claim taking place.

For the defendants, it was urged, that there was no impropriety in the solicitor's conduct; that the court would not interfere to prevent the operation of a fine, unless in cases of fraud; and that the bill being, in substance, a mere bill for discovery, could not operate to prevent the bar arising from the fine.

Lord *Loughborough*.—“ If it were made out that
“ the plaintiffs were prevented from trying their cause
“ by

“ by fraud, I should think, under the principles of
 “ this court, the defendants ought to be restrained
 “ from setting up the fine as a bar ; but here the plain-
 “ tiffs take it for granted, that a bill filed in this court
 “ for any purpose, will prevent the statute of limita-
 “ tion, or a fine barring. All legal interests are bound
 “ by the fine ; if the subject-matter of the suit be of
 “ legal jurisdiction, the bringing a suit in equity will
 “ not bar the operation of the fine. If a demand of
 “ a debt be made here, if it be a legal debt, this court
 “ being applied to for a discovery, will not prevent the
 “ statute of limitations from running ; but if it be for
 “ payment out of assets, for which this is the proper
 “ jurisdiction, there the filing of the bill is the com-
 “ mencement of a proper suit. I do not say, that a
 “ case may not exist where the bad faith of par-
 “ ties may make a ground to prevent a fine from bar-
 “ ring ; but here was only a communication of the
 “ truth of the case ; the attorney stated all he knew :
 “ it was not his duty to give notice of the fine : it was
 “ not in proof that it was in consequence of this they
 “ did not try the cause. It was their own judgment
 “ that decided upon it. A legal bar has taken place
 “ in consequence of a legal provision, whether that
 “ provision be wise or not, it must bind. No hard-
 “ ship has occurred, in consequence of which they can
 “ say, that in conscience the fine should not be set up.
 “ This is a legal title, over which this court has no ju-
 “ risdiction, and no fraud has intervened. The bill
 “ must therefore be dismissed.”

Lord Commissioner *Ashhurst*.—“ I am of the same
 “ opinion,—where a bill is filed, with a prayer for
 “ equitable relief, the policy of the law suspends the
 “ statute of limitations ; just as in the case of the com-
 “ mencement of an action. But, with respect to a
 “ fine, the case is different ; the bringing an action is
 “ not sufficient to bar the operation without an actual
 “ entry ; no more can the bringing a suit here be so,
 “ unless the entry was prevented by fraud. In any
 “ other case, the filing the bill cannot prevent the bar,
 “ and, in this case, there was no fraud, but a fair
 “ disclosure.”

Lord Commissioner *Hotham* — “ If the filing of
 “ the bill is not a sufficient bar, it will stand on the
 “ circumstances of the case. It was a mere bill of
 “ discovery, which is not sufficient. If the circum-
 “ stances are such, that there had been an imposition
 “ on the party, I think the court should interpose ; but
 “ it was a fair candid conversation.” The bill was
 dismissed.

An appeal was brought from this decree to the House
 of Lords ; and, on behalf of the appellants, it was said,
 that it belongs to the jurisdiction of courts of equity,
 not only to give relief where the party entitled to the
 lands has a title only in equity, but also where the
 plaintiff in equity has the legal estate, and can recover
 at law, provided the deeds which are evidence of his
 title are in the hands of the defendant in possession of
 the lands. The court, in such cases, relieves, by de-

creeing a production of the deeds upon a trial at law, by restraining the defendant from setting up satisfied terms; and (in case an account of the rents is also prayed) will, after a recovery at law, by the aid of the court, decree an account of rents and profits. In like manner, where the plaintiff has the title at law, and can make it out at law, without any aid from deeds in the defendant's hands, yet, if the defendant has in his hands an instrument which will defeat the plaintiff's legal title, and has also another instrument in his hands which will restore the plaintiff's title, equity will either decree the defendant not to give the first instrument in evidence at law, or to produce both. This is the present case: for the plaintiffs, as heirs of *Elizabeth Handasyde*, could make out their title at law to the lands, which did not pass by her will, without any aid, by proving their pedigree: but it was in the power of the defendants to nonsuit the plaintiffs, by shewing, that *Sir John Thornycroft* was in his life-time seised of the estate in question, and that he devised it to *Forster*, whereby *Elizabeth*, his sister and heir at law, was disinherited. But by the conveyance of 1745 from *Forster* to *Elizabeth* in fee-simple, and the production of it at law, the plaintiffs would be reinstated in their title as heirs to *Elizabeth*. The original bill was brought for a production and inspection of all the title-deeds by the heirs of *Elizabeth Handasyde* against the devisee, to which production the heir was entitled. And the plaintiffs presuming that some aid of the court might appear to be finally necessary to try the title at law, the bill prayed an account of rents and profits and delivery of the

deeds belonging to the descended estates. In the course of pursuing and obtaining this discovery, it came out, that Sir *John Thornycroft* the son made a will, and devised to *Forster*, and it also came out by the last answer, that *Forster* had conveyed to *Elizabeth Handasyde* in fee. It also came out, that the lands in question were comprised in an old settlement 1722, and in a term of five hundred years thereby created for raising annuities, which have been satisfied, but the term remained outstanding; subject to which term, Sir *John Thornycroft*, the son, took the lands in question. So that it was undoubted, that if there were no other circumstances in the case, the court had a jurisdiction, and should have decreed upon the hearing of the cause, that the bill should be retained, with liberty for the plaintiff to bring an ejectment, that the defendants, the devisees, should not set up the term of five hundred years; and, in case the will of Sir *John Thornycroft* the son should be produced in evidence, the defendants should likewise produce at the trial the deed of 1745, and that all further directions should be reserved till after the trial was had. The only circumstances in the present case which differed from the above, and which were the grounds of dismissing the bill, were, that in *Hilary* term 1773, (the next after the death of *Elizabeth Handasyde*), the devisee levied a fine of all the devised estates, and also of the descended estates, (having entered upon both immediately after her death). The original bill was filed in 1776. The five years non-claim ran from *Michaelmas* 1778. In *October* 1781, the answer came in which discovered the deed
of

of 1745, and admitted it to have been in the hands of the devisee from the time of the death of *Elinabeth Handasyde*; and the answer also stated and insisted upon the fine and non-claim. The cause was heard the first of *July* 1783, at which time the court should have added to the directions above mentioned, that the fine and non-claim should not be insisted upon at law, instead of dismissing the bill upon the ground of such fine and non-claim only, as the non-claim had elapsed pending the suit in Chancery; and, therefore, the court ought not to have permitted the defendant to take advantage of it at law. For a court of equity will not suffer the rights of the parties to be changed, pending the suit in a case within the jurisdiction of the court, and where the court can relieve; therefore, if a trust estate is before the court in a *lis pendens*, and a sale be made of the trust estate, without actual notice of the cause to the purchaser, the court, at the hearing, will decree the relief against the purchaser, which the plaintiff in the cause was entitled to. But it is otherwise after the cause is at an end, for then the party must have express notice of a decree, as he must of a judgment at law, to affect him with equity. So, in the case of a fine, equity will not suffer a non-claim completed, pending the cause, to prevent the court from doing equity; otherwise, (as Lord *Hardwicke* expressed it in 2 *Atk.* 390.), it would trip up the jurisdiction of this court, if you will not allow (where it is a proper matter of equity) a bill to prevent the running of a fine. So where a court of equity has directed an action, the defendant has been restrained from setting

up the statute of limitations, which has run pending the suit in equity.

On the other side, it was contended, that the title of the appellants, if they ever had any, was a clear title at law ; it needed no assistance of a court of equity to bring it to a fair discussion : and, accordingly, the mother of the appellant *Pincke* and the appellant *Thornycroft* brought an ejectment, which might have been fairly tried without any such assistance ; and there was now no obstacle to a legal determination of the rights of the appellants, except the fine. That there was no ground for a court of equity to interpose, to remove the legal bar created by the fine. It was apprehended the farm at *Newington* was devised by the will ; but, supposing the contrary, there was not in the case any circumstance which could give a court of equity a controul over the legal title of the respondents, nothing which could form a legal obligation upon their conscience, not to set up the fine. The appellants attempted to impute fraud to the respondents or their solicitor ; but the bill did not state such a case as warranted the imputation, much less was it made out in proof. A fine was a matter of record open to the inspection of every one ; the Legislature had given it an operation to bar all claims not asserted in due time, and it was, therefore, the duty of every person having a claim, to inform himself whether there might be such an impediment to the assertion of it. Not disclosing to an adversary that a fine had been levied, which might in time be a bar to his claim, could not be deemed a fraud,

fraud. It was endeavoured, therefore, to give to the conversation of the solicitor for the defendant and the solicitor for the plaintiff in the ejectment, (of which, there was no evidence but the answers) such a turn as might make it appear something like fraud. But the solicitor for the defendant merely mentioned a claim made by persons to whose apparent title he was then unable to give any answer, and which had therefore excited in his mind much apprehension for his client's title; and what he communicated was not only true, but (according to the information he then had) was the whole truth, though a subsequent accidental discovery put an end to this alarming claim, which, if it had prevailed, was superior to the title of the heirs, as well as of the devisee of Mrs. *Handasyde*. It was true, the heirs countermanded their notice of trial of the ejectment, but their own judgment decided their conduct. It was asserted by the appellants, that if the ejectment had proceeded to trial, the fine must have been discovered, and, five years not having then elapsed from the last proclamation, the heirs might have entered to avoid the fine. But this assertion was not founded in truth; the will of Sir *John Thornycroft* would have been a sufficient defence, and there would have been no necessity for setting up the fine.

It was ordered and adjudged, " That the said decree
 " or order of dismissal complained of in the said ap-
 " peal should be reversed. And it was further or-
 " dered and adjudged; that the bill should be retained
 " for twelve months, and that the plaintiffs should be
 " at

“ at liberty, in the meantime, to bring such action or
“ actions at law as they should be advised, &c. And
“ it was further ordered and adjudged, that the said
“ defendant *Edward Thornycroft* should not insist in
“ such action or actions, or on any trial to be had
“ thereon, on the fine mentioned in the pleadings, or
“ on any non-claim which had ensued thereon, or any
“ other fine or non-claim which might have incurred
“ since filing the original bill.”

TITLE XXXVL

COMMON RECOVERY.

CHAP. I.

Of the Origin and Nature of a Common Recovery.

CHAP. II.

Of the Writ of Entry.

CHAP. III.

Of the Tenant to the Præcipe.

CHAP. IV.

Of Voucher.

CHAP. V.

Of Judgment.

CHAP. VI.

Of Execution.

CHAP. VII.

*In what Courts and of what Things a Recovery may
be suffered.*

CHAP. VIII.

Of the Parties to a Recovery.

CHAP. IX.

Of the Amendment of Recoveries.

CHAP.

CHAP. X.

Of the Operation of a Recovery in barring Estates Tail, Remainders, and Reversions.

CHAP. XI.

Of the Effect of a Recovery in barring other Estates, and Interests.

CHAP. XII.

Of some other Effects of a Recovery.

CHAP. XIII.

What Persons, Estates, and Interests, are not barred by a Recovery.

CHAP. XIV.

How Recoveries may be reversed and avoided.

CHAP. I.

Of the Origin and Nature of a Common Recovery.

§ 1. *Origin of a Recovery.* | § 8. *Manner in which it is suffered.*

Section 1.

Origin of a
Recovery.

A RECOVERY in its most extensive sense, is the restitution of a former right, by the solemn judgment of a court of justice; and judgments, whether obtained after a real defence made by the tenant, or upon his default, or scint plea, have equally the same force and efficacy to bind the right of the land so recovered, and to vest a free and absolute estate in fee simple in the recoveror.

§ 2. A com.

Title XXXVI. Recovery. Ch. I. § 2.

§ 2. A common recovery is a judgment obtained in a fictitious suit brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit. Bac. Tracts 148.

§ 3. A common recovery departs so far from the original modes of transferring property, and is in its process so complicated and artificial that if we had no historical evidence of the time when it was first adopted among the common assurances of the law, we might safely pronounce it to be in some respects a modern invention; but the fact is well known that we are indebted to the ingenuity of the ecclesiastics for the introduction of common recoveries, in order to evade the statutes of *mortmain*, by which they were prohibited from purchasing or receiving, under pretence of a free gift, any lands or tenements whatsoever. To effect this purpose the religious houses used to set up a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant by collusion made no defence, whereby judgment was given for the religious house, which then recovered the lands by sentence of law, upon a supposed prior title.

Although proceedings of this kind were carried on by a species of conventional fraud, between the religious house and the tenant of the land, yet the judges held, that in these cases the religious communities did not appropriate such lands *per titulum domi vel alterius alienationis*, as the statute of *mortmain* expresses it, nor that they were within the words *aut alio quovis modo*. Flowd. 43.

arte vel ingenio ; for as recoveries were prosecuted in a course of law, they were presumed to be just ; and it was accordingly held by the courts of justice that they were not within the statute.

§ 4. The notoriety and evidence which attended feigned recoveries was such, that they were not used by the ecclesiasticks alone, but were soon adopted by lay persons, as a common mode of transferring lands. Thus it appears by the statute of *Gloucester*, 6 Ed. 1. that feigned recoveries were at that time in constant use, for it is provided by the 11th chapter of that statute, that a termor for years might falsify a feigned recovery, suffered by the owner of the inheritance.

§ 5. The want of moderation on the part of the ecclesiasticks counteracted the effects of their ingenuity ; for being gratified by the success of their practices, they had such frequent recourse to feigned recoveries as to occasion a parliamentary interference ; hence by the statute of *Westminster* 2. 13 Ed. 1. c. 32. it was enacted, that in all cases where ecclesiastical persons recovered lands by default, a jury should try the right of the demandants to the land, and if the religious house was found to have a title, they should recover seisin, otherwise it should be forfeited to the immediate lord of the fee, in the manner directed by the statute of mortmain.

§ 6. In consequence of this restraint, feigned recoveries seem to have been disused for a considerable time, nor were they again brought into general practice

tice until some centuries afterwards, when they were resumed as a mode of evading the strictness of the statute *de donis conditionalibus*.

§ 7. Many attempts were made by the people to procure a legislative repeal of this offensive statute, but they were constantly and successfully opposed by the great barons; however, as the inconveniences arising therefrom were so manifest, the ingenuity of the judges was continually exerted in contriving different modes to evade it; at length a case arose in the 12 Edw. 4. in which it was in effect determined, upon principles which will be explained in a subsequent chapter, that a common recovery suffered by a tenant in tail should operate as an effectual bar to his estate tail, and also to all the remainders and the reversion depending thereon. From that time common recoveries have become extremely frequent, and have ever since been considered as common assurances, by means of which, tenants in tail are enabled to dispose of their estates tail, or to convert them into estates in fee simple.

Tit. 2. ch. 2,
c. 32.

Willes Rep.
451.

§ 8. A common recovery being a judgment obtained in a real action, although it be fictitious, yet the same mode of proceeding must be pursued, and all those forms strictly adhered to which are necessary to be observed in an adversary suit; for, as *Pigot* observes, though common recoveries are to some intents deemed fictitious proceedings, yet it is necessary there should be *actores fabulae*.

Manner in
which it is
suffered.

§ 9. The first thing therefore requisite to be done, in suffering a common recovery, is, that the person who is to be the demandant, and to whom the lands are to be conveyed, should sue out a writ or *precipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *precipe*.

§ 10. In obedience to this writ, the tenant of the freehold appears in court, either in person or by his attorney; but instead of defending the title of the land himself, he calls on some other person, who, upon the original purchase, is supposed to have warranted the title, and prays that such person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those which he shall lose by defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty.

1 Inst. 101 b.

§ 11. The person thus called to warrant the title (who is usually called the vouchee) appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The demandant then desires leave of the court to *imparle* or confer with the vouchee in private, which is granted of course. Soon afterwards the demandant returns to court, but the vouchee disappears, or makes default; in consequence of which it is presumed by the court that he had no title to the lands demanded in the writ, and therefore could not defend them, whereupon judgment is given for the demandant, now called

called the recoveror, to recover the lands in question against the tenant, and judgment is also given for the tenant to recover against the vouchee, lands of equal value, in recompence for the land so warranted by him, and now lost by his default.

§ 12. This is called the recompence, or recovery in value; but as it is customary to vouch the cryer of the Court of Common Pleas, who is hence called the common vouchee, the tenant can only have a nominal recompence for the land thus recovered against him by the demandant.

§ 13. A writ of *habere facias seisinam* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated; and on the execution and return of this writ, the recovery is completed.

§ 14. The recovery here described is with single voucher; but a recovery may, and is frequently suffered with double, treble, or farther voucher, as the exigency of the case may require.

§ 15. In a recovery with double voucher, the tenant or proprietor of the land, conveys an estate of freehold to some indifferent person, against whom the writ is brought; the tenant to the *præcipe* then vouches the proprietor of the land, who vouches over the common vouchee.

1 Inst. 96.

§ 16. In every common recovery the demandant acquires the fee simple of the lands recovered although the word heirs be not mentioned in the judgment, because the writ being brought for the absolute property or fee simple of the lands, if judgment is obtained, it must be for as much as was demanded in the writ, and in all adversary suits every recoveror recovered a fee simple.

TITLE XXXVI.

RECOVERY.

CHAP. II.

Of the Writ of Entry.

§ 1. *Things requisite to a Recovery.* | § 2. *Writ of Entry.*

Section 1.

IT appears from the preceding chapter, that the following things are requisite to the validity of a common recovery : First, That a proper writ be sued out. Secondly, That the person against whom the writ is brought, be actual tenant of the freehold. Thirdly, That such tenant do vouch over some other person. Fourthly, That judgment be given for the demandant against the tenant, and for the tenant against the vouchee. And, Fifthly, That the recovery be executed by the sheriff of the county in which the lands lie. We shall now proceed to explain more particularly those different circumstances. .

Things requisite to a Recovery.

§ 2. A common recovery being a judgment in a real action, it cannot, of course, be regularly commenced, without a proper original writ ; however, if a recovery is suffered without an original writ, it is not absolutely void, but only voidable.

Writ of Entry.
3 Rep. 3 a.

§ 3. A common recovery may be suffered on any writ, by which lands are demandable; but the writ which is now usually sued out for that purpose, is a writ of entry *sur disseisin* in the nature of an assize, which is properly grounded on a disseisin done to the demandant himself; it may be brought in the *per*, the *per* and the *cui*, or the *post*; and, in common recoveries, it is always brought in the *post*. And the reason why this writ was chosen for the purpose of suffering common recoveries, was, because the tenant may, in this species of action, vouch at large, and is not bound to vouch within the degrees of the *per*, the *per* and the *cui*, or the *post*; so that it is the safest action for purchasers, who need not fear writs of error for wrong or illegal vouchers. In this writ, the demandant alleges, that the tenant had no legal title to the land, but came into possession of it after one *A. B.* had turned out the demandant.

§ 4. When a recovery became a common assurance, the king, by that means, frequently lost his fines for alienation; but, by the statute 32 Hen. 8. c. 1. s. 15. it was enacted, that fines for alienation should be paid upon obtaining writs of entry in the *post* for suffering common recoveries.

§ 5. The writ on which a recovery is suffered ought to be similar in every respect to a writ which is sued out for the purpose of commencing an adversary suit. The courts, however, make a distinction between a *breve adversarium* and a *breve amicabile*, and will construe

Booth Real
Actions 176.
2 Inst. 154.

2 Rol. Rep.
67.

stare the latter in a much more favourable manner than the former.

§ 6. Thus, where a writ of error was brought to reverse a common recovery, which had been suffered on a writ of entry in the *poft* of a manor, and of a yearly rent or pension of four marks, and also of an advowson, one of the errors assigned was, that a writ of entry in the *poft*, does not lie of an advowson. But it was unanimously determined, that the judgment should be affirmed, because a common recovery was not to be compared to a judgment in an adversary suit, as it is by usage and custom become a common assurance and conveyance of lands, and is had by the mutual consent of the parties, *et consensus tollit errorem*. Besides, if it were otherwise, no recovery could be suffered of an advowson or common in gross, or of many other things, which would be highly inconvenient.

Dorner's
Case, 5 Rep.
40
Poph. 22.

§ 7. So, where a writ of entry bore date 1 Mar. 7 Eliz. and the return was made *die Lunæ quarta Septimana quadragesimæ proxim. futur.* the said first day of March, being the first week of Lent, 7 Eliz. and upon this it was inferred, that the tenant was not to appear until Monday in the fourth week of Lent, 8 Eliz. which was a long time after the voucher appeared and vouched over. But it was determined by the whole court, that the original writ should be taken as it was written, to be returnable on Monday in the fourth week of the same Lent, 7 Eliz. for it shall be taken (as it is written shortly) in such a manner as to make the recovery good.

Barton's
Case. Poph.
100. Cro.
Eliz. 388.

Anon. Lit. -
Rtp. 299.

§ 8. A common recovery was suffered, but no writ of entry was filed ; in consequence of which, a writ of error was brought : it was moved that it might be examined, whether any writ of entry had been filed or not : but the court denied it, though, if it appeared upon record that a writ had been filed, then they would consider, whether a new writ should be filed or not ; and it was said, that if a recovery was exemplified pursuant to the statute 23 *Eliz.* though some part of it was lost, yet it would be aided.

H. Black. R.
vol. i. 526.

§ 9. By a rule of the Court of Common Pleas, made *Trin.* 30 *Geo.* 3. “ It is ordered, that, from and
“ after the first day of *Mich.* term, then next ensuing,
“ in every common recovery wherein the vouchee or
“ vouchers shall personally appear at the bar of that
“ court for the purpose of suffering such recovery,
“ the writ of entry shall be sued out, and produced at
“ the time of the recording of the vouchee’s or vouch-
“ er’s appearance at bar, at the foot of the *præcipe* in
“ such recovery.”

TITLE XXXVI.

RECOVERY.

CHAP. III.

Of the Tenant to the Præcipe.

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| <p>§ 1. <i>Reasons why the Tenant to the Præcipe should have the Freehold.</i></p> <p>17. <i>Where there are Leases for Lives, they need not be surrendered.</i></p> <p>19. <i>But Persons having a prior Estate for Life must join.</i></p> <p>21. <i>A Surrender by the Tenant for Life is sometimes presumed.</i></p> <p>29. <i>Different Conveyances by which a Tenant to the Præcipe may be made.</i></p> | <p>§ 30. <i>Fine.</i></p> <p>35. <i>Although no Use be declared.</i></p> <p>37. <i>Husband seised jure ux. may make a Tenant to the Præcipe without his Wife's joining in a Fine.</i></p> <p>40. <i>Feoffment.</i></p> <p>42. <i>Bargain and Sale inrolled.</i></p> <p>45. <i>Lease and Release.</i></p> <p>46. <i>A Recovery sometimes good without a Tenant to the Præcipe.</i></p> <p>47. <i>Statute 14 Geo. 2.</i></p> |
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Section 1.

A COMMON recovery being a real action carried on through all its forms, it is absolutely necessary, that the person against whom the writ of entry is brought, should have an estate of freehold, by right or by wrong, in the lands to be recovered, either at the time when the writ is purchased, or at least before judgment is given; because, if he has not the freehold, it will not be in his power to restore the lands as the writ directs. And, in common recoveries, there is an additional reason; because, as the demandant can recover nothing against the tenant, unless the tenant has the

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freehold,

Reasons why the Tenant to the Præcipe should have the Freehold. Pigot 28. Booth 3.

freehold, so the tenant can have no recompence in value against the vouchee, in consideration of what he has lost; for, until the demandant sues out execution against the tenant, the tenant cannot have execution against the vouchee; and if the tenant has nothing in the land, no execution can be sued against him, nor can any recovery in value be had over; consequently, there will be no recompence to bind him, and the recovery will be no bar.

§ 2. If the tenant to the *præcipe* acquires the freehold at any time before judgment is given, it will be sufficient.

§ 3. Thus, in ejectment, it appeared by a special verdict, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summonæus ad warrantizandum*; so that he was not seised of the freehold at the return of the writ of entry. The Court of Common Pleas determined, that the recovery was valid. A writ of error was brought in the Court of King's Bench, and it was contended on the part of the plaintiff in error, that the recovery was void, because, although a common recovery was a common assurance, yet it had forms peculiar to itself which ought to be observed. In supposition of law, the tenant ought to have the lands at the time of suing out the writ, otherwise he cannot render them as the writ supposes. The court supposes the tenant to be seised of the lands, otherwise, to what purpose are the lands demanded from him? The voucher supposes that the tenant has seisin of the lands, for it would be absurd that the tenant should

Lacey v. Will-
liam. 10 Rep.
Temp Holt.
614.
2 Salk. 568.
1 Ld. Raym.
227. 475.
Carth. 472.

should vouch another person to warrant lands to him which he has not. On the other side, it was argued, that in all cases of adversary actions, although the person against whom the writ was brought was not tenant at the time of the *teste*, but became tenant before the return, it was sufficient. If the tenant to the *præcipe* was not seised at the return of the writ, he might avoid it by pleading non-tenure; if instead of that he vouched over, then he admitted the writ to be good as to himself, but still the vouchee might counterplead the tenancy; if he did not, the recovery would be good by estoppel against the parties to it; however, in such a case, the tenant to the *præcipe* could not recover over in value, because he had lost nothing; but if the tenant acquired the lands after the voucher, and judgment was given against him, it would bind the land; and as the tenant had lost the land, he would recover in value against the vouchee: so that the recovery would be effectual. This being the law in adversary suits, it ought certainly to be so in common recoveries, which the judges take notice of as common assurances, and which they will always support, if possible.

It was adjudged that this recovery was good; and Lord Chief Justice Holt said, the general rule was, that if the tenant to the *præcipe* acquired the freehold at any time before the judgment was given, it was sufficient, because it cannot then be said, that the recovery was had against a person who had nothing in the lands; and it was not enough in a counterplea of voucher to say, the voucher had nothing in the lands at the time of the voucher, without

Sambourn v.
Belke,
1 Show. 347.
S. P.

without adding *net unquam postea*; therefore a writ might be made good by a subsequent purchase, so might a voucher; which was the more reasonable, because the demandant might have a good cause of action, although the tenant had not the land when he commenced his suit; so that it was sufficient, in law, if the tenant had the land to render at any time before judgment.

The statute 14 Geo. 2. which will be stated at the end of this chapter, has obviated all objections of this kind against the tenant to the *præcipe*.

§ 4. If the tenant to the *præcipe* has the freehold at the time when judgment is given, although his estate be afterwards defeated, yet the recovery will be good.

Anon.
4 Leon. 84.
Goldsb. 82.

§ 5. Thus, where land was given to an alien in tail, remainder over to another in fee; the alien suffered a common recovery, and died without issue. All this was found by office, and it was contended, that the alien was not tenant to the land when the recovery was suffered; but the court held the contrary, that the recovery was good.

Gilb. Ten.
26.

§ 6. It has sometimes been doubted in practice, whether upon the death of a person whose widow is entitled to dower, the heir can suffer a recovery before assignment of dower. No case of this kind has ever, I believe, been determined; but it follows, from the principles laid down by Chief Baron Gilbert, that such a recovery would be good, for he says the law casts

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the freehold on the heir, immediately upon the death of the ancestor; but the law does not cast dower on the wife, she takes it by her own act. It is true, that when the widow is endowed, the possession that the law casts on the heir is avoided, and the widow is considered as being in, from the death of her husband; but still the heir had the freehold until dower was assigned, which is sufficient to support the recovery.

Tit. 6. c. 4.
f. 2.

Vide Lit.
f. 393.

§ 7. Although a person has acquired the freehold by disseisin, yet he will be a good tenant to the *præcipe*; and in all cases where the validity of a common recovery is contested, the court will suppose that there is a good tenant to the *præcipe*, if nothing appears to the contrary.

Lincoln College Case,
3 Rep. 58.

Griffin v.
Stanhope,
Cro. Ja. 544.

§ 8. If a writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be valid, for the recompence in value will go to the person who has really lost the estate.

1 Vent. 358.
Paulin v.
Hardy. Skin.
3. 63. Shep.
Tou. 41.

§ 9. If there be two joint-tenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will only be good for the moiety of the person against whom the writ was brought; but as to the other moiety, it will be void for want of a tenant to the *præcipe*.

Marquis of
Winchester's
Case, 3 Rep. 1.

§ 10. As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows,

laws, that no person who has not an estate of freehold, can of himself suffer a common recovery, because he cannot convey a freehold to the person against whom the writ is to be brought.

Keb. 735.
785.

§ 11. Thus, where a lessee, *pour auter vie*, made a lease for 60 years, and died, in the lifetime of the *cestui que vie*, the person in reversion, being tenant in tail, suffered a common recovery, which was held erroneous for want of a good tenant to the *præcipe*; for, upon the death of the tenant, *pour auter vie*, the freehold was cast on the tenant for years; so that he, or some person claiming under him, ought to have been tenant to the *præcipe*.

Dormer v.
Parkhurst,
3 Atk. 135.
6 Brown Parl.
Ca. 351.

§ 12. So where lands were limited to Sir Robert Dormer for 99 years, if he should so long live, remainder to trustees and their heirs, to preserve contingent remainders, remainder to his first and other sons in tail male. Sir Robert having issue a son, Fleetwood Dormer, they both joined in levying a fine to make a tenant to the *præcipe*, and then suffered a common recovery. The principal question in this case was, whether the freehold passed to the trustees, there being a considerable error in the words by which the remainder was limited to them? And the court having determined, that the freehold did pass to the trustees, they concluded that the recovery was void; for if it was considered as the recovery of Robert Dormer, it was void, because he being only tenant for years, could not give a freehold to another, without which, there could not be a good tenant to the *præcipe*; for, to

make

make him so, he must have a freehold in him. And, taking it as the recovery of *Fleetwood* the son, it could not be good, the freehold being in the trustees, and not in him, he having only a remainder expectant on the determination of their estate. And as to the fine levied by *Robert Dormer* and *Fleetwood*, it stood thus: considered as the fine of *Robert*, it was void for want of a freehold, it being settled beyond all doubt, that a fine by tenant for years operates nothing, and was absolutely void; and, considered as the fine of *Fleetwood*, it was equally so for want of a freehold in him, it being equally clear, that none can levy a fine but he who has a freehold in possession.

§ 13. It has been long settled, that a devise to executors for payment of debts, and, until debts are paid, only gives the executor a chattel interest in lands thus devised, and, therefore, does not prevent the disposal or descent of the freehold; so that, if after such a devise, the testator gives the same lands to a person for life, the freehold will vest in such devisee immediately on the death of the testator, and he will be enabled to make a good tenant to the *præcipe*.

1 Inst. 42 a.
3 Rep. 96 a.

§ 14. So, if a testator gives his executors full power to receive the mesne profits of his estates in a particular place, upon trust to pay his debts, and afterwards devises those estates to a person for life, the freehold will become vested in such devisee on the death of the testator, and he may make a good tenant to the *præcipe*.

§ 15. Thus,

Carter v.
Barnardiston,
1 P. Wms.
505.
3 Brown Parl.
Ca. 64.

§ 15. Thus, where Sir *Michael Armyne* being seised in fee of several estates in the counties of *Huntingdon, Lincoln, &c.* made his will, and thereby desired, that his executors would take care to see all his debts and legacies paid by making sale of his personal estate; and as his debts were great, he devised to his executors all his manors and lands of *Cherry Orton* and *Botolph Bridge*, to be by them sold for the most that could be got, and the monies arising from such sale disposed of in the payment of his debts and legacies. And, lest both his personal estate and the monies to arise from such sale should not be sufficient, the testator gave his executors full power to receive the mesne profits of his whole estate, lying in *Pickworth* and *Willoughby*, in the county of *Lincoln*. The testator then devised the said manors of *Pickworth* and *Willoughby*, after such time as his debts and legacies should be paid by the rents and profits thereof, to *Evers Armyne Esq.* for his life, without impeachment of waste; and in case the said *Evers Armyne* should have any issue male, then to such issue male and his heirs for ever; and after the decease of the said *Evers Armyne*, in case he left no issue male, then after such time as his debts and legacies were fully paid, he devised the manor of *Pickworth* to *Thomas Style* in fee. *Evers Armyne*, the devisee, having got into possession of the said manors of *Pickworth* and *Willoughby*, suffered a common recovery of them before the debts were paid, and declared the uses thereof to himself in fee. This case having been heard in the House of Lords, the Judges were directed to give their opinions, “ whether the estate for life was vested “ in *Evers Armyne* at the time of the recovery, before

“ all

“ all the debts were paid, so that he could make a
 “ good tenant to the *præcipe* ?” And the Lord Chief
 Justice of the Court of Common Pleas, in the name
 of all the Judges who had consulted together, delivered
 their unanimous opinion, “ That the estate for life
 “ was vested in *Evers Armyne* at the time of the
 “ recovery.”

§ 16. It is not only necessary for a person, who suffers
 a common recovery, to have an estate of freehold in
 the lands, but it is also necessary that it should be an
 estate in possession ; for the person against whom the
 writ is brought must be actual tenant in possession of the
 freehold at the time when judgment is given ; so that it
 frequently happens, that persons who are entitled to
 estates of inheritance in lands, are, notwithstanding,
 disabled from suffering common recoveries of them, in
 consequence of their not having a freehold in posses-
 sion. This happens in two instances : 1st, Where the
 lands are let out on leases for lives : 2dly, When there
 is an estate for life prior to their estate of inheritance.

§ 17. Before the statute of *quia emptores*, subinfeudations, whereon rents and services were reserved, did
 not prevent a writ of entry from lying against the free-
 holder of the seignory ; when common leases to farmers
 for one or more life or lives reserving rent came in use,
 they resembled subinfeudations, and, therefore, ought
 not to have prevented the *præcipe* from being brought
 against the owner of the freehold under which the
 leases were granted ; but it was, however, thought ne-
 cessary, and became usual, for the person who intended

Where there
 are Leases
 for Lives,
 they need not
 be surrendered.

1 Bur. 115.

to suffer a recovery, to get conditional surrenders from the tenants for lives, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *precipe*.

§ 18. This practice being productive of several inconveniencies, the lessees for life being sometimes unwilling, and frequently unable, from want of age or understanding, to make such surrenders, and it being in some instances doubtful in whom such leases for lives were vested, the statute 14 Geo. 2. c. 20. reciting that several leases had been, and were likely to be made, of honours, castles, manors, lands, tenements, and hereditaments, for one or more life or lives, under particular rents thereby reserved and to be reserved, and that, procuring surrenders of such freehold leases or the tenants thereof to join, frequently occasioned great trouble, difficulty, and expence to tenants in tail, it is therefore enacted, s. 1. " That all common recoveries
 " suffered, or to be suffered, in his Majesty's Court of
 " Common Pleas at *Westminster*, or in any other court
 " of record in the principality of *Wales*, or in any of
 " the counties palatine, or in any other court having
 " jurisdiction of the same, of any honours, castles,
 " manors, lands, tenements, or hereditaments, with-
 " out any surrender or surrenders of such lease or
 " leases, or without the concurrence, or any convey-
 " ance or assurance from such lessee or lessees, in order
 " to make good tenants to the writs of entry, or other
 " writs whereupon such recoveries have been, or shall
 " be had or suffered, shall be as valid and effectual in
 " law, to all intents and purposes whatsoever, as if
 " such

“ such lessee or lessees, or any other person or persons
 “ claiming under him, her, or them, had conveyed,
 “ or joined in conveying, or shall convey, or join in
 “ conveying, a good estate of freehold to such person
 “ or persons as has, or have been, or shall become te-
 “ nant or tenants to such writs of entry, or other writs,
 “ whereupon such common recoveries have been, or
 “ shall be suffered.”

§ 19. Although this statute has made the surrender of leases for lives unnecessary, yet it does not extend to estates for life which are prior to the estate of which a recovery is intended to be suffered. Such estates must, therefore, still be surrendered to the person against whom the writ of entry is brought, for this case is expressly excepted in the statute 20 Geo. 2. c. 20. s. 2. by which it is provided, “ That nothing in that
 “ act contained should extend, or be construed to ex-
 “ tend, to make any common recoveries valid and
 “ effectual in law, unless the person or persons entitled
 “ to the first estate for life, or other greater estate (in
 “ case there was no such estate for life in being) in re-
 “ version or remainder, next after the expiration of
 “ such leases, has or have, by some lawful act or
 “ means, conveyed or assured, or joined in conveying
 “ or assuring, or shall, by some lawful act or means,
 “ convey or assure, or join in conveying or assuring an
 “ estate for life, at the least, to such person or persons
 “ as has or have been, or shall become tenant or te-
 “ nants to the writ of entry, or other writs whereupon
 “ such common recoveries have been or shall be
 “ suffered.”

But Persons
 having a prior
 Estate for
 life must
 join.

Pigot 50.

§ 20. The prior estate for life ought to be surrendered to the person who has the remainder or reversion before he makes a tenant to the *præcipe*; but if the surrender is made after the execution of the deed, by which the lands are conveyed to the person who is to be tenant to the *præcipe*, it must then be made to him, otherwise it will be void, because the person who is to suffer the recovery has then no reversion in him for the surrender to operate upon.

A Surrender
by the Tenant
for Life is
sometimes
presumed.

§ 21. Common recoveries having been long considered as common assurances of lands, and in the nature of conveyances by consent, the judges have, in consequence of particular circumstances, sometimes presumed that the tenant for life had surrendered his estate, although a surrender was not actually proved; and therefore where the possession has accompanied a recovery for a long time, the court will presume a surrender by the tenant for life to make a tenant to the *præcipe*.

Green v.
Froud,
3 Keb. 310.
1 Mod. 117.
1 Vent. 257.

§ 22. In an ejectment upon a trial at bar for lands held in ancient demesne, a recovery in the court of ancient demesne was produced, which had been suffered a long time before, and the possession had gone accordingly. It appeared, that part of the land was leased for life, and the recovery was by the person in reversion; so that there was no tenant to the *præcipe*. But the court said, that as the possession had gone with the recovery for so long a time, they would presume a surrender; as in an appropriation of great antiquity,

antiquity, a licence has been presumed, although none appeared.

§ 23. So where collateral evidence has been given of a surrender by a tenant for life, the recovery has been deemed good.

§ 24. Upon a trial at bar, the lessor of the plaintiff claimed under an old intail in a family settlement, and part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery. The defendant who claimed title under the recovery not being able to shew a surrender of the mother's life estate, it was insisted that there was no tenant to the *præcipe*, as to that part; so that the remainder, which the lessor of the plaintiff claimed, was not barred. To obviate this objection, it was insisted by the defendant, that after so long a time had elapsed, a surrender should be presumed according to the doctrine laid down in the case of *Green v. Froud*; and to fortify this presumption, they offered to produce in evidence the debt book of Mr. *Edwards*, an attorney at *Bristol*, then a long time dead, wherein he had charged 32 *l.* for suffering the recovery, two articles of which charges were, for drawing a surrender of the mother's estate 20 *s.* and for ingrossing two parts thereof 20 *s.* and that it appeared by the book, that the bill had been paid. This being objected to as improper evidence, the court were of opinion that it should be allowed; for it was a circumstance material upon the enquiry into the unreasonableness of presuming a surrender of the widow's life estate, and could

Warren ex
dem. Webb
v. Grenville,
2 Str. 1129.

not be suspected of having been done for this purpose. If *Edwards* had been living, he might undoubtedly have been examined; and after his death this was the next best evidence, and it was accordingly read; after which the court declared, *that without this circumstance they would have presumed a surrender, and desired it might be taken notice of, that they did not require any evidence to fortify the presumption after such a length of time.*

§ 25. But where there is no reason or ground to found a presumption, that the tenant for life had surrendered his life estate, and where the possession has *not* gone with the recovery, the court will not presume that such a surrender was made.

Goodtitle ex
dem. Bridges
v. the Duke
of Chandos,
2 Burr. 1065.

§ 26. *G. R. Bridges* being tenant in tail of a considerable estate, whereof he was in possession of some part, the remainder being held by a widow, on whom it had been settled for life, for her jointure, and who was then in possession of it, suffered a common recovery of the whole estate tail, using such descriptions as were sufficient to include the whole estate tail, and then settled it on the Duke of *Chandos*. Upon the death of *G. R. Bridges*, the Duke of *Chandos* entered into possession of all the estate, except the part of which the widow was in possession, and upon her death, he took possession of that part also. An ejectment was brought against the Duke of *Chandos* by *James Bridges* the reversioner, for that part of the estate tail whereof the widow was in possession, at the
time

time when the recovery was suffered ; upon the ground that there was no surrender of the widow's life estate : the Duke of *Chandos* being unable to give any sort of evidence of an *actual surrender*, his counsel insisted at the trial that a surrender of the widow's life estate ought to be *presumed* after so long a time, even though they should not give any evidence whatsoever of such a surrender ; but Mr. Justice *Noel*, who tried the cause, was of opinion, that a surrender of the tenant for life could not be presumed, when no sort of evidence had been given to make such a fact in the least probable ; and when the possession had not gone with the recovery, but had continued in the tenant for life until the time of bringing the ejectment, and accordingly he directed the jury to find for the plaintiff. Upon this direction a motion was made for a new trial. The defendant's counsel relied on the cases of *Green v. Froud*, and *Warren ex dem. Webb v. Grenville*, mentioned in the preceding pages. On the other side it was argued for the plaintiff, that there could be no presumption without some facts to ground it upon. In the case of *Mr. Grenville*, there was a very strong presumption arising from the articles in the attorney's bill, the proof whereof the court allowed to be entered into, and received satisfaction from it ; and that there was no case where a presumption of a surrender had been raised, without possession accompanying and following the recovery.

In the case of *Froud v. Green*, upon which *Mr. Grenville's* case was said to be grounded, there

was a possession which had followed the recovery for a long time, and that was the very reason there given for the courts forming the presumption which they then made. That the rule in all the cases cited, and in all cases of this kind, must in reason and common sense, necessarily be understood to relate to the length of time which has elapsed *since the tenant in tail's coming into possession*; and not to the length of time since the suffering of the recovery. The outstanding life estate, during the life of the widow, forms the strongest presumption that she did not surrender the estate; besides, it did not at all appear from the Judge's report that *G. R. Bridges*, the tenant in tail in possession of all the *rest* of the estate, and of which he had power to suffer a recovery, ever meant or intended to suffer a recovery of these settled lands, which he had no power to do; he had other lands upon which the recovery operated, and there was no reason to imagine that he meant to include these lands, or that he ever attempted to procure a surrender of them. Lord Mansfield.—“ I was counsel in the case
 “ of Mr. Grenville reported by *Strange*, and I re-
 “ member very well that the point of evidence was
 “ strongly litigated; the attorney, who had been
 “ concerned in the transaction of the common reco-
 “ very, was one *Edwards* of *Bristol*, who had been
 “ then long dead: the entry in his bill book was
 “ made at the time of the transaction, and a receipt
 “ had been given upon the bill which contained the
 “ articles *for drawing and ingrossing the surrender*;
 “ so

“ so that there was positive proof in that case of an
 “ actual surrender: and there the jointress had been
 “ dead *a vast number of years*, and the person who
 “ suffered the recovery, and his son after him, had
 “ both of them, during their respective lives, suffi-
 “ cient opportunity to have set it right after they
 “ came into possession, if they had known or sus-
 “ pected it to have been defective, which certainly
 “ formed a presumption that it was regular, and not
 “ defective.—I am confident that all the court did,
 “ or intended to do in that case, was only to take care
 “ that it should be understood, that they did not
 “ mean to shake the authority of any one case which
 “ had been founded upon presumption, and that they
 “ would not require positive proof of a surrender, in
 “ any case, where there was sufficient presumption of
 “ it. Sir J. Strange’s report is incorrect, considered as
 “ a foundation for a principle or rule of property,
 “ though it might be enough to serve the taker of
 “ such a note for a memorandum to refresh his own
 “ recollection; if that be so, then consider the pre-
 “ sent case upon principles. There are two sorts of
 “ presumption; one, a presumption of law, and not
 “ to be contradicted; the other a species of evidence,
 “ which latter must have a ground to stand upon;
 “ something from whence it is to arise. It is now
 “ fully settled and established, that a tenant in tail
 “ may, if he pleases, either turn his estate tail into a
 “ fee simple, or alienate it for his own benefit, by
 “ suffering a common recovery; but he must have a
 “ sufficient estate, and power to qualify him for suf-
 “ fering

“ fering ſuch a recovery ; he muſt either be tenant in
 “ tail in poſſeſſion, or he muſt have the concurrence
 “ of the freeholder, who claims under the ſame ſet-
 “ tlement. This principle is adhered to by the ſtatute
 “ 14 Geo. 2. c. 20. the tenant for life, whoſe conſent
 “ is neceſſary to the tenant in tail in remainder, to
 “ enable him to cut off the intail, is not the leſſee of
 “ the land under a beneficial leaſe, but the original
 “ tenant for life, claiming under the ſame family ſet-
 “ tlement, and having a life eſtate ſettled upon him
 “ prior, in order of ſucceſſion, to the other's re-
 “ mainder in tail. Where a perſon has a power to
 “ ſuffer a recovery, and thereby bar his eſtate tail,
 “ *omnia præſumuntur rite & ſolemniter acta*, until
 “ the contrary appears ; and it is reaſonable that it
 “ ſhould be ſo : but if the contrary appear, then there
 “ is an end of ſuch preſumption. This was the caſe
 “ of the Earl of *Suffolk's* recovery, upon a trial at
 “ bar in this court, in *Eaſter* term, 1747 ; there the
 “ contrary *did* appear, and the preſumption was
 “ thereby deſtroyed ; there were blundering deeds
 “ actually produced, which appeared clearly to be
 “ wrong ; and it was manifeſt, upon the evidence
 “ diſcloſed, that there was not a good tenant to the
 “ *præcipe* : it was therefore impoſſible for the court,
 “ in that caſe, to preſume that there was a good
 “ tenant to the *præcipe*.

Keen ex dem.
 Earl of Portſ-
 mouth v.
 Earl of Ef-
 ſingham,
 2 Stra. 1267.

“ But if a man has power to ſuffer a recovery,
 “ that is a ſolid and reaſonable ground for pre-
 “ ſuming that all was done rightly and regularly,
 “ unleſs

“ unless something to the contrary shall appear.
 “ Where the freeholder is a trustee for the tenant in
 “ tail himself, and under his power and direction, it
 “ is a reasonable and just cause for presuming, that
 “ every thing was regularly transacted; so where the
 “ person or persons interested to object against the
 “ validity of a recovery have had opportunity to make
 “ objections to it, but instead of doing so, have ac-
 “ quiesced under it, and not disputed its validity,
 “ this forms a presumption that all was right and
 “ regular. But there can be no presumption in the
 “ nature of evidence, in any case, without something
 “ from whence to make it, some ground to found the
 “ presumption upon; whereas here is absolutely no-
 “ thing from whence to presume a surrender: the
 “ single pretence to any the least ground of presump-
 “ tion, in the present case, can only be this, that no
 “ tenant in tail in remainder would suffer a recovery,
 “ without first getting a surrender of the life estate,
 “ in order to make it valid and effectual. But even
 “ that ground, slight as it is, will not hold in the
 “ present case; for it does not at all appear, upon the
 “ report of the Judge, that *G. R. Bridges*, who suf-
 “ fered the recovery in question, had the least inten-
 “ tion whatsoever to include those particular lands in
 “ the recovery which he suffered, and which he had
 “ full power in himself alone to suffer, of all the rest of
 “ the estate whereof he was at that time tenant in tail
 “ in possession. He was then in possession of the manor
 “ of *Keynsham*, and of other lands in *Keynsham*, suf-
 “ ficient to answer the general descriptions used in the
 “ recovery,

“ recovery, he must probably know, or have been
 “ informed by his counsel or agents, that he had no
 “ such power over the settled parts, without obtaining
 “ a surrender of the life estate; he might perhaps be
 “ satisfied that he could not obtain a surrender of the
 “ life estate, or he might have attempted to obtain it,
 “ and failed in such attempt. If the mere fact of a
 “ remainder-man in tail’s suffering a recovery was
 “ alone sufficient to ground a presumption of a sur-
 “ render of the life estate; it would be in the power
 “ of every remainder-man in tail to bar the estate tail,
 “ notwithstanding the tenant for life should absolutely
 “ refuse to join with him in suffering a recovery; it is
 “ therefore necessary that there should be facts and
 “ circumstances to ground a presumption of such a
 “ surrender upon: whereas in the present case it is so
 “ far from being reasonable to presume that there was
 “ such a surrender from the jointress, that there are,
 “ on the contrary, many reasons to induce a suspicion
 “ that there was not such a surrender; she might
 “ have more regard for *James Bridges* than for *George*;
 “ she might think it wrong or unkind to hurt the
 “ reversioner, or even whim and peevishness might
 “ prevent her from interfering: there is no defining
 “ the various reasons she might have to hinder her
 “ from surrendering her life estate for such purpose.
 “ *Mr. George Bridges* being therefore only tenant in
 “ tail in remainder, and the life estate under the same
 “ settlement, still subsisting at the time of his suffering
 “ the recovery, it is clear that he had no power to
 “ alien or to bar. And there is nothing from whence

“ to presume a surrender of the life estate to enable
 “ him to do so.

“ If he had any power to bar or alien, then indeed
 “ no presumption could have been too large, in order
 “ to prevent slips in legal forms and methods of conveyance, and to effectuate the intention of a person
 “ who had a legal right to do such an act. No argument can be drawn in the present case from length
 “ of time, because the ejectment was brought immediately upon the death of the jointress.” The court were all clear and unanimous, that there was no colour for objecting to the Judge’s direction.

At the sitting of the court the next morning, Lord *Mansfield* mentioned this case again: he said he had looked into his own notes of the case of *Warren*, on the demise of *Webb* against *Grenville*, where the recovery was of forty years standing: and the court did lay it down in that case, “ that, after a recovery of
 “ forty years standing, they would, without any other
 “ circumstances, presume a conditional surrender to
 “ have been made by the tenant for life;” and they relied upon 1 *Ventr.* 257, and Mr. *Pigot*’s book, p. 41. But his lordship observed, that there are other circumstances, in the case in *Ventris*; and there is nothing in *Pigot*, to justify this general position. And he added, that in the case then at the bar, the court did (as he had taken it down) admit as evidence the entry in the attorney’s book, as has been mentioned. He said, he was rather more strongly of opinion than he was yesterday, “ that in the present case, there
 “ was

“ was no ground for a presumption that there was
“ any surrender by the tenant for life.” Here were
two particular reasons against making any such pre-
sumption. One was, that there did not appear to
have been any intention in the remainder-man in tail,
to suffer a recovery of these particular lands : the
other, that here was no possession at all, under this
recovery ; but, on the contrary, the ejectment was
brought, and the validity of the recovery put into
litigation, immediately after the death of the tenant
for life. If the eldest son, who has a remainder in
tail under a family settlement, should privately suffer
a common recovery, and his father live many years
afterwards, it might as well be argued, “ that length
“ of time from the date of the recovery should induce
“ a presumption, that the father surrendered his estate
“ for life.” And his lordship declared himself as
clear, that if there had been a long possession by the
tenant in tail after the death of the tenant for life,
though such a possession might be ascribed to the
entail, the presumption ought to have been made, upon
the ground of acquiescence under it, and the proba-
bility arising therefrom, “ that the parties knew that
“ the recovery was not defective.” Rules of pro-
perty ought (his lordship said) to be generally known,
and not to be left to loose notes, which rather serve
to confound principles, than to confirm them. He
therefore proposed to have a conference with all the
judges upon this case : which proposal did not arise,
he said, from any doubt about the matter ; (for he
was more confirmed in his opinion, than he was yef-
terday

terday;) but for the sake of having to considerable a rule of property settled, and of rendering it notorious and publick. For which purpose, he (at first) ordered it to stand over till next term: but afterwards, upon its being agreed by all the parties, that, in Mr. Grenville's case, there was a great number of years during which the tenant in tail had been in possession after the death of the tenant for life; and upon the now defendant's counsel candidly declaring "that they themselves were fully satisfied with the present opinion of the court," he retracted his proposal, and said he would not trouble the Judges with it, since the counsel were so candid as to acquiesce entirely in the opinion that the court had already intimated. His lordship further added, that he would have it understood, that possession of the tenant in tail, after the death of the tenant for life, does leave a ground of presumption, "that there was a surrender." But in the present case, there was no possession after the death of the tenant for life: the ejectment was brought immediately.

§ 27. Where, after a recovery the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life to the tenant to the *præcipe* or not, it was decreed for the recovery, without allowing a trial at law; for where deeds are suppressed *omnia præsumuntur*.

Gartside v.
Radcliffe,
4 Cha. Cl.
292.

§ 28. Where a person has only a trust estate of freehold, he may notwithstanding make an equitable tenant

tenant to the *præcipe*, which will enable him to suffer what is called an equitable recovery, of which the effect will be stated hereafter.

Different Conveyances by which a Tenant to the *Præcipe* may be made.

§ 29. When the person who means to suffer a common recovery is in actual possession of the freehold, he may convey that freehold to any stranger, for the purpose of making him tenant to the *præcipe* by fine, by feoffment, by bargain and sale inrolled, or lease and release.

Fine.

3 Keb. 597.

§ 30. It is sometimes thought expedient to make a tenant to the *præcipe* by fine, not only on account of the notprietty of this species of assurance, but because even an erroneous fine gives such an estate to the cognizee, as is sufficient to make him a good tenant to the *præcipe*. And Sir M. Hale has said that the cognizee of a fine *oct. purif.* would be a good tenant to the *præcipe* in a recovery suffered the same day, and the court would presume a priority to support a conveyance.

Lloyd v. Evelyn,
2 Salk. 568.

§ 31. Thus, where a writ of error was brought against a person who was made cognizee of a fine, in order to become tenant to the *præcipe*, and after the recovery had been suffered, the fine was reversed for error; yet the recovery was held good, because there was a good tenant to the *præcipe* at the time.

§ 32. But if the fine was in itself absolutely void, as if the person who levied it had no estate of freehold in

in the land, then the recovery would be void, because in that case the fine passed no estate. Thus in the case of *Dormer v. Parkhurst*, which has been already stated, a fine was levied by a tenant for years, and a remainder-man in tail to make a tenant to the *præcipe*, and it was determined that the recovery was void; because none of the parties to the fine had an estate of freehold in the lands.

§ 33. If a fine be levied to a lessee for years of the same land for the purpose of making him tenant to the *præcipe* in a common recovery, the term for years will not be merged by the fine: for in the third section of the statute of uses, 27 Hen. 8. there is a saving to all persons and their heirs, who shall be seised to any use, of all such former right, title, &c. as they had to their own use, in any manors, lands, &c. whereof they shall be seised to any other use.*

1 Vent. 195.
1 Mod. 1-7.

Ferrers v.
Termor,
Tit. 11. ch. 3.
f 42.

§ 35. It is a well known principle of law, that where a fine is levied without any consideration or declaration of use, the use and legal estate immediately result to the cognizor of the fine; so that the cognizee has only a seisin of an instant; in consequence of this doctrine, where a fine was levied, in order to make a tenant to the *præcipe*, and a writ of entry was brought against the cognizee of the fine, on which a common recovery was suffered, it was doubted whether such a recovery was good; for as no use was declared on the fine, it was said that the use and estate immediately resulted back to the cognizor, so that the

Although no
Use be de-
clared.

3 Keb. 113.

Bigot 52.

Pigot, 54, 55.

cognizee had no estate of freehold when the writ of entry was brought, nor ever afterwards. Mr. Pigot held, however, that such a recovery would be good; for, at common law, if a fine was levied without consideration, as in a fine there needs none, the cognizee was tenant to all writs, until the statute of perjury of profits, and the statute of uses. And although, since the statute of uses, the use results back when no use is declared, yet the intent of the parties always guided the use, and there could be no resulting use, against the express intention of the parties; so that whenever the use results, it is because the parties intend it.—Now, in a case of this kind, the evident intention of the parties is to make a tenant to the *præcipe*, which appears upon the record, by the writ of entry being brought against the cognizee, and therefore he must have such an estate as will make him a good tenant to the *præcipe*. These principles are fully established in the following case:

Lord Altham
v. Lord
Anglesey,
Gilb. Rep. 16.
Salk. 676.
Cases temp.
Holt. 733.
14 Mod. 210.

§ 36. Tenant in tail, remainder in tail, with remainder over, the tenant in tail levied a fine *sur cognizance de droit come ceo, &c.* to J. S. and his heirs, in order to make him tenant to the *præcipe*, but no use was declared on the fine. Seven years afterwards a writ of entry was brought against J. S. who vouched the cognizor of the fine, and a common recovery was thus regularly suffered. The question was, whether J. S. had an estate of freehold in him when the recovery was suffered? It was contended, that although the legal estate passed by the fine to J. S. yet as no use

use was declared on the fine, the use resulted back to the cognizor ; so that *J. S.* had no estate in the lands at the time when the recovery was suffered, and therefore was not a good tenant to the *præcipe*. But it was held by Lord Chief Justice *Holt*, and all the other Judges, that when a fine was levied, or a feoffment made, to a man and his heirs, the estate was in the cognizee or feoffee, not as an use, but by the common law, and might be averred to be so ; and as in this case the intention of the fine plainly appeared to be for the purpose of making a tenant to the *præcipe*, the use and estate should be allowed to have vested in *J. S.* so that the recovery was well suffered ; and this point was again determined by the Court of King's Bench in *Mich. 3 Geo. 1.* 1 *Stra. 17.*

§ 37. It has been often doubted, whether a husband seized *jure uxoris* could make a tenant to the *præcipe* of his wife's land, for the purpose of suffering a common recovery, without his wife's joining him in a fine. This doubt, probably, arose from the words of Lord *Talbot*, in the case of *Robinson v. Cummins*, as reported in cases *tempore Talbot* 167, for there his Lordship is made to say, " it hath been said that a feme, tenant in " tail, and her husband, cannot make a tenant to the " *præcipe* without a fine ; but whatever may be the " case, where a husband is merely seized in right of " his wife, is not necessary for me to determine, be- " cause, in this case, Sir *J. Robinson* did by his inter- " marriage, become entitled to an estate by the curtesy,

Husband
seized *jure*
uxoris, may
make a Te-
nant to the
Præcipe
without his
Wife's join-
ing in a Fine.

“ and, therefore, he alone, without his wife’s joining,
 “ might have made a good tenant to the *præcipe*.”

Cases and
 Opinions,
 vol. 1. 436.
 vol. 2. 132.

In an opinion given by the late Mr. *Booth* on this subject, he observes, that this report of Lord *Talbot*’s argument is incorrect; that he himself was present at the hearing of that case, and had a very full note of it; and that Lord *Talbot*’s words were these:—
 “ If I should lay it down as a rule, that, where
 “ the wife is entitled to an estate tail in possession, her
 “ husband and she could not make a tenant to the
 “ *præcipe*, for the docking of the intail without a fine,
 “ because the law is supposed to appoint no other me-
 “ thod, by which a woman under coverture can con-
 “ vey her freehold, but by fine, I should shake many
 “ of the common recoveries of the kingdom; for,
 “ whatever may have been the practice of some over-
 “ cautious conveyancers, yet I believe it hath often
 “ been held, that the husband alone may, by deed
 “ only, and without any fine levied by the wife, con-
 “ vey a sufficient freehold to the grantee, to make him
 “ tenant to the *præcipe* *.”

r Inf. 351 a.
 Idem 273 b.

This latter opinion seems to be perfectly consistent with the principles of the common law; for Lord *Coke* says, “ if a man taketh to wife a woman who is seized

* Mr. *Booth*’s account of what Lord *Talbot* said on this occasion, is confirmed by a manuscript report of the case of *Robinson* and *Cummins*, in the possession of Mr. *Butler*, of which he has made mention in a note on the *First Institute*, 326 b.

“ in fee, he gaineth by the intermarriage an estate of
“ freehold in her right, which estate is sufficient to work
“ a remitter.”

§ 38. It must be the same where a man marries a woman seised in tail, for a feme-covert cannot have a seisin distinct from her husband; and, on this ground, it has frequently been determined, that the husband's conveyance is sufficient to transfer a good estate of freehold during the joint lives of the husband and wife. Mr. Pigot was of the same opinion, having laid it down, that a husband, seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, might create an estate of freehold during the coverture, and thereby make a good tenant to the *præcipe*; and there is a case in *Roll's Abridgement*, in which this point was expressly determined.

Gilb. Ten.
108.
1 Roll. Ab.
845.

Fig. 72.

§ 39. A husband seised in right of his wife for life, remainder in tail to B., remainder to C., bargained and sold the land to another, against whom a *præcipe* was brought, who vouched him in remainder, and so a common recovery was suffered. Adjudged, that the recovery barred the remainder, because the bargainee was a good tenant to the *præcipe*.

Roll's Ab.
Tit. Recovery, (A.) pl. 4.

§ 40. It has been a frequent practice ever since the introduction of common recoveries, to make a feoffment with livery of seisin of the lands, to the person against whom the writ of entry was intended to be brought, it being a common opinion, that a feoffment

Feoffment.

was the most secure conveyance by which a tenant to the *præcipe* could be made; because, if the feoffor was in possession at the time when livery of seisin was made, the feoffment was supposed to pass a good estate of freehold, either by right or by wrong; that is, by disseisin; but this doctrine has been denied in the following case:

Taylor ex
dem. Atkyns
v. Horde,
1 Barr 60.
6 Brown Parl.
Ca. 633.

§ 41. In an ejectment for lands in *Gloucestershire*, the jury found a special verdict, that Sir *Robert Atkyns* senior, being tenant for life, with remainder to his first and other sons, reversion in fee to himself, with a power of appointing a jointure to any after-taken wife, married *Ann Dacres*, and, pursuant to his power, limited the lands in question to the said *Ann Dacres*, for her life as a jointure. Sir *Robert Atkyns* senior, made his will duly attested, and devised his reversion in fee, expectant on the estate tail, limited to his first and other sons, to Mr. *Atkyns* the lessor of the plaintiff. Sir *Robert Atkyns* senior died, leaving a son, Sir *Robert Atkyns* junior, who entered on all the estate, except that part which was limited to Lady *Atkyns* for her jointure, on which she entered. Lady *Atkyns* being in possession of these lands, an ejectment was brought against her in the Common Pleas by *John Philips*, on the several demises of Sir *Robert Atkyns* junior, and *Joseph Walker*, for the recovery of the premises in question, on the ground, that Sir *Robert Atkyns* senior had no power of appointing her a jointure; and the same was tried at the bar of the Court of Common Pleas, when a verdict was found for the plaintiff, on which

which judgment was entered, and a writ of *habere facias possessionem* was sued out and executed; and Sir Robert Atkyns junior entered into, and was in possession of the premises. Sir Robert Atkyns junior being thus in possession during the lifetime of Lady Atkyns, made a feoffment of the premises, with livery of seisin to James Earle, in order to make him tenant to the *præcipe*, for the purpose of suffering a common recovery, which it was thereby declared, should enure to the use of Sir Robert Atkyns junior, his heirs and assigns for ever. A common recovery was accordingly suffered, in which the writ of entry was brought against James Earle, the feoffee, who vouched Sir Robert Atkyns junior and his wife, and they vouched over the common vouchee. Sir Robert Atkyns junior continued in possession, from the time of the recovery until November 1711, when he died without issue. Lady Atkyns, the jointress, brought an ejectment against Robert Atkyns the heir at law of Sir Robert Atkyns junior, for the recovery of her jointure; the cause having been tried at the bar of the Court of Common Pleas, and it appearing evidently to the court, that Sir Robert Atkyns senior had a power of appointing a jointure to Lady Atkyns, which he had duly executed, and that the former verdict was clearly wrong, a general verdict was given for the plaintiff, on which judgment was entered, and Lady Atkyns was restored to the possession of the premises, and continued seised of them until the time of her death. The principal question in this case was, whether the recovery was well suffered? which entirely depended upon, whether James

Earle the feoffee of *Sir Robert Atkyns*, was a good tenant to the *præcipe*.

It was contended, on the part of the plaintiff, that the recovery was not well suffered ; and, to shew that *James Earle* took no estate by the feoffment, which could make him a sufficient tenant to the freehold, to answer the writ in a common recovery, it would be material to consider, first, whether *Sir Robert Atkyns* junior was tenant in tail in possession ; and, secondly, supposing him to be only tenant in tail in remainder, whether his feoffment conveyed the freehold to *James Earle* by disseisin ? As to the first of these questions, if *Sir Robert Atkyns* had been tenant in tail in possession, his bargain and sale, his lease and release, his fine, or his feoffment, would have conveyed a base fee ; and operating by way of discontinuance, voidable either by the entry or action of the issue in tail, or remainder-man, would have made, by discontinuance, a sufficient tenant of the freehold ; but *Lady Atkyns*, the jointress, was seised of the freehold for life, at the time of making the feoffment, and never joined in conveying an estate to the feoffee ; the feoffment, therefore, being only the act of the tenant in tail in remainder, must either pass an estate by disseisin, or was absolutely void. Then, whether the feoffment conveyed the freehold to *John Earle*, so as to make him a good tenant to the *præcipe* by disseisin, depended, first, on his entry ; secondly, on his feoffment. By his entry, he gained no freehold ; by his feoffment, he conveyed no estate ; for, as to his entry, it was made under a mistaken

mistaken judgment in ejectment, for Lady *Atkyns*, the jointress, recovered possession again in ejectment; by which second judgment, his title was disaffirmed; and as the first judgment was plainly wrong, his entry must be considered as the mere act of tenant in tail in remainder. By the judgment in ejectment, he could recover nothing but the term; the point of that action is, that the plaintiff may gain possession under his term. The possession of the lessee being that of the lessor, the way in which it always operates to the lessor's benefit, is, that by obtaining judgment for the possession of his supposed tenant, he is enabled to enter; and, having entered, the possession unites with any present freehold in himself, whether it be a particular estate, or an estate in fee according to his right. But, in this case, Sir *Robert Atkyns* had no present estate of freehold in himself, he gained only a bare possession, and the freehold still remained in judgment of law, in the jointress who had the right to it: the entry of Sir *Robert Atkyns* under the judgment, must be a lawful entry; whether the sheriff executes the writ and gives possession, or whether the party is his own officer, and executes it for himself by taking possession: it has been held, that the entry is equally lawful in either method, if it pursues the judgment. But his possession being recovered without title, no holding over could gain the freehold; and his entry being lawful, no holding over, though wrongful, could create a disseisin, or change the cause of his possession; so that his conveyances were absolutely void, he having no estate on which a release would operate by way

of enlargement, and there being no privity between him and the owner of the freehold. As to the feoffment of Sir Robert Atkyns, it might be considered in two lights. First, as a conveyance, operating either by right or by wrong. Secondly, as a conveyance, executed with a particular intent of making a tenant to the *præcipe* in a common recovery. 1st, As a conveyance, generally, it was not pretended that it could operate by right; it could only then be construed to convey a freehold by wrong. But it was a necessary consequence of the reasoning upon Sir Robert Atkyn's entry, that his feoffment was absolutely void; for, where the true owner of the freehold is actually expelled by the tortious entry of the disseisor taking violent possession of the land, that disseisor has gained an estate of freehold and fee, which will pass by a bare livery on his feoffment, his force gained him an estate by wrong, and his feoffment will convey it. But, in this case, the entry and the possession being lawful so long as the judgment was in force, the only wrongful act from which a disseisin could be inferred, was the feoffment. The giving livery upon that feoffment, not followed by any possession of the feoffee, could never make a disseisin in the strict, original, and legal sense; it would be a disseisin merely at the election of the rightful owner of the freehold, and for the sake of his remedy. It was the act of his tenant for years, and the wrongful feoffee was put into possession; the true owner might either accept his rent, and treat him as an under-tenant and assignee of the term, or he might maintain an assize and recover the freehold. If the wrongful

wrongful feoffor continued in possession by collusion with his feoffee, as in the present case, the true owner was under no necessity to take notice of the feoffment; he was not bound to consider his own tenant as a disseisor, and himself as out of possession, but still had it in his election, either to accept his rent, distrain and bring an action for it, or to proceed in a real action for recovery of the freehold, as in case of a forfeiture. Thus, the feoffment of tenant for years, or tenant by sufferance, would make a disseisin for the benefit of his lessor, in respect of that remedy which the lessor might elect to take; but estates in remainder could not be displaced without a tortious entry; and, as to such remainders, the feoffment was absolutely void in law.

2d, As a conveyance, executed with the particular intent to make a tenant to the *præcipe* in a common recovery, it had never yet been determined, that the feoffment of a tenant for years, being also tenant in tail in remainder, perfected by livery upon the land, under colour of lawful possession *eo animo*, to make a tenant of the freehold in a common recovery, would be sufficient to support the judgment in that recovery, and enable him to bar his own and the subsequent estates; if so, then a tenant in tail in remainder might suffer a recovery in every instance, as freely as a tenant in tail in possession, not only without the concurrence of the immediate owner of the freehold, by his joining in it as an essential party, or surrendering his estates, but even without asking his consent, or giving him any notice. By collusion with the tenant for years, by secret practices, to take advantages of a vacant possession,

possession, when the tenant of the freehold was absent from his house or land, he might execute a feoffment, and then suffer a common recovery, to anticipate that right which the law has wisely and justly postponed, till he should chance to succeed in the order of the entail. If this method of suffering recoveries were once established as legal, the eldest sons of the first families in *England*, who are tenants in tail in remainder, expectant on the estate for life of the father, might dispose of the inheritance of their estates at the age of twenty-one, against the consent, and in spite of the authority or the freehold of their parents. Conveyances to make a tenant to the *præcipe* in a common recovery, are considered as mere instruments to make parties in a fictitious action, to serve the purpose of him who means to suffer the recovery. Such a feoffee, as in the present case, was often called a mere *actor fabulæ*. If he was tenant for years of the lands conveyed by the feoffment before the making of it, his term would not merge in the fee-simple; no dower could arise out of it; his judgments or statutes would not bind it. This being the uniform tenor of determinations in courts of law, in which the intent of the conveyance has been considered, and not the mere legal operation of it, it followed, that the validity of the estate must depend on the right and power of him who made it to suffer a recovery. If the feoffor had no such right or power, his feoffment was void; and the estate conveyed, being founded in fraud, was as no estate, in judgment of law. The common law avowed these principles, and the Legislature had adopt-
ed

ed them ; for the statute 14 Geo. 2. c. 20. which was made to support common recoveries against nice exceptions, and to raise presumptions in favour of them after a limited time, most anxiously provides, that the persons joining in such recoveries should have sufficient estate and power to suffer the same ; as if the Legislature had foreseen the present case, and were aware and afraid that tenants in tail in remainder might, by colour of that law, in future times suffer common recoveries, without the concurrence of the true immediate owner of the freehold.

On the other side, it was argued, that this recovery was valid, and that *James Earle* was actually tenant of the freehold when judgment was given. First, because when Sir *Robert Atkyns* entered, in consequence of the judgment which he obtained against Lady *Atkyns*, the jointress, he became tenant in tail in possession. Secondly, because even if he were only tenant for years, his feoffment would convey an estate of freehold. In support of the first of these positions, it was argued, that a judgment is an act of law, and, whilst it continues in force, destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoveror. If the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not enter, or be entitled to the writ of *habere facias possessionem* ; but his having a right to enter and sue out that writ, infers his right to the possession.

Whilst

Whilst the judgment stands in force, it removes an intervening estate out of the way, and, during that time, it is the same thing as if it had never existed, and the recoveror's right to the possession will continue until judgment is reversed by error, or falsified in another action. In consequence of these principles, it followed, that the right to the possession and the remainder in tail meeting in the same person, and that person being Sir *Robert Atkyns*, the possession and the remainder in tail united, and Sir *Robert Atkyns* became seised of an estate tail executed, or, in other words, of an estate tail in possession. If the nature of an action of ejectment, and the consequence resulting from a recovery in it, were considered, it would appear in a clearer light. An ejectment is a possessory action, in which almost all titles to land are tried; whether the party's title is to an estate in fee, tail, for life, or for years, the remedy is by one and the same action. In an action of ejectment, the plaintiff recovers only the possession of the land, and the execution is of the possession only; but if the lessor of the plaintiff recovers only the possession of the land, it may be asked, how he becomes seised according to his title? To which, it may be answered, that when a person is in possession by title, as every person is who enters in execution of a judgment in ejectment, because the law does no wrong, the possession and title unite; for it is a rule of law, that when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title. As where the title is to have a fee, he becomes seised in fee; where the

the title is to have an estate tail, he becomes seised of an estate tail, and so on, the law casting the estate upon him according to his title : and, were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates, and would never answer the purpose for which it was brought into use, if the lessor of the plaintiff acquired no more than a bare possession after an execution or entry on a judgment in ejectment. In support of the second position, it was said, that a feoffment operated on the possession, without any regard to the estate or interest of the feoffor. A grant operated on the estate or interest which the grantor had in the thing granted. To make a feoffment good and valid, nothing was requisite but possession ; and, where the feoffor had the possession, although it was but a bare and naked one, yet a freehold or fee-simple passed by reason of the livery. It was no plea in avoidance of a feoffment, that the feoffor had nothing in the land at the time of the feoffment, because the land passed by the livery ; if the operation of the feoffment was questioned, the only plea was, *ne enfeoffa pas*, which put in issue only the livery. Lord Chief Justice *Holt* laid it down as clear law, in the case of *Hunt v. Burne*, that if a lessee for years makes a feoffment with livery, though the lessor be on the land protesting against it, yet the land passes, because the lessee was entitled to the possession. And this opinion was supported by the determination in the case of *Read and Morpeth v. Errington*, where the question was, if a feoffment by a lessee for years, the lessor being upon the land, was a good feoffment ? for

Lit. f. 611.
698.
1 Inst. 366 b.

Year-Book,
10 Ed. 4. 8, 9.

Cro. El. 321.

it was pretended, that his being upon the land guarded it so that no feoffment could be made ; but the court was of opinion, that the feoffment was good, because the lessee had the sole right to the possession, and livery ought always to be given of the possession. Before the statute of uses, a *cestui que use* conveyed the use by bargain and sale, and afterwards levied a fine to a stranger. And the question was, whether the fine was not void, as neither of the parties had any thing in the land ? for, by the bargain and sale, the use was in the bargainee, and nothing was in the bargainor or in the stranger. It was argued, that if this fine was not good, great inconveniencies would follow, for that many recoveries had been suffered against the bargainor after he had conveyed the use : to which, *Fitzherbert* replied, “ It is the folly of purchasers that they do not “ take a feoffment from the *cestui que use* before the “ fine is levied ; for if they do, the fine will be good. “ I, for my part, (says he) will never purchase any “ land without taking a feoffment, so that I may be “ in possession when the fine is levied ; for then the fine “ will undoubtedly be good.” The possession here spoken of must be a freehold at least, because nothing less than a freehold will support a fine ; for if neither the cognizor nor cognizee had an estate of freehold in possession, remainder or reversion, at the time of levying the fine, it would be void. The feoffment here spoken of is the feoffment of a *cestui que use* after he had parted with the use, and whilst the freehold and inheritance of the estate was in the feoffees, so that it was the feoffment of a person who had only a bare and
naked

naked possession (unaccompanied with right) to a stranger. This was the opinion, and this was the practice, of one of the greatest lawyers of the age. The observations upon the opinion of *Fitzherbert* are, that if a feoffment from the *cestui que use* to a stranger, after he had conveyed the use, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the *præcipe*; and for this plain reason, because the feoffment passed a freehold. There is a case in *Dyer* 340, where the feoffment of a person in remainder, in the absence of the tenant for life, was determined to be a good feoffment. The case was, a remainder-man in fee enfeoffed a stranger, in the absence of a tenant for life, who neither attorned nor assented to the feoffment, but occupied the estate during his life; and it was held to be a good feoffment for the fee-simple. And in the case before the court, the feoffment was made by Sir *Robert Atkyns* the remainder-man, in the absence of the tenant for life, who neither attorned nor assented, and who occupied the estate during her life. A distinction was made between rightful and wrongful conveyances. A fine, release, or bargain and sale, are called rightful conveyances, and a feoffment a wrongful one; but no such distinction exists, for all conveyances are in themselves equally rightful, and are to be made use of according to the nature of the case to which they are applicable; that a freehold would not pass by a fine, release, or bargain and sale, from a person who had only a bare and naked possession, did not proceed from these conveyances being lawful ones, but from the nature of them, whose property it was to convey nothing

but what the maker of them might lawfully convey, because they operated as a grant; therefore, to infer from thence, that a freehold would not pass by a feoffment which was a conveyance of a different operation, and whose property was to pass a freehold and fee by force of the livery, was an inconclusive argument; every one who can get into possession has, and ever had, a power to make a feoffment, for the law makes no distinction of persons; and, whenever a tenant in tail in remainder had obtained the possession, whether by right or by wrong, and had done an act whilst in possession to make a tenant to the *præcipe*, in order to suffer a common recovery, no instance could be produced where such an act had been adjudged fraudulent, unfair, or irregular. The principal argument, opposed to the doctrine here laid down, might be reduced to the head of inconvenience. But the question was not, what inconvenience would attend the determination either way, but what was the law. The inconvenience, if there were one, arose from the nature and operation of a feoffment, and could not be avoided but by taking away that conveyance, or depriving it of an operation which it had been allowed to have by all the sages of the law. But, to do that, was not in the power of a court of justice, since no maxim of the common law could be abrogated or abolished, but by a legislative authority. It was once thought to be a great inconvenience, that a descent, immediately after a disseisin, should take away the entry of the person disseised; at another time, it was thought to be no small one, that the son should lose his patrimony because he happened to be born out of time; and, until lately,

lately, an heir might have been deprived of his family estate by the warranty of an ancestor, who was never in possession of it. These inconveniencies were as great as that which was pretended to arise from the feoffment of a tenant in tail in remainder, expectant on an estate for life, and yet they continued through ages, till the Legislature took them away; when the law was doubtful, it might be allowable to draw an argument from inconvenience; but, where the law was clear and precise, as it was, that the feoffment of a person in possession, let him come to the possession how he would, passed a fee, an argument from inconvenience was not admissible, because it tended to undermine and overthrow the law.

Lord *Mansfield* delivered the resolution of the court, of which, I shall present the reader with an abstract, as far as it relates to the validity of the recovery. “As Lady *Atkyns* had an estate for life in the premises, and did not join by surrender or otherwise, in any conveyance of the freehold to *James Earle*, the tenant to the *præcipe*, the great question is, whether *James Earle* had acquired the freehold by disseisin?” The better to judge of this question, it will be proper to attempt finding out what the old law meant by a disseisin, which constituted the tenant of the freehold, in respect of every demandant suing out a *præcipe*, although the owner’s entry was not taken away; for, where the right of possession was acquired, and the owner put to his real action, there, without doubt, the possessor had got the freehold, though by wrong.

Feud. lib. 1.
Tit. 25.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted, or pass. *Sciendum est feudum sine investitura nullo modo constitui posse.* Disseisin must, therefore, mean, some way or other of turning the tenant out of his tenure, and usurping his place and feudal relation. Formerly, no tenant could alien without licence from the lord; when the lord consented, the only form of conveyance was by feoffment, publicly made *coram paribus*, with the lord's concurrence. Homage or fealty was solemnly sworn, and suit of court and services were frequently done. The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers. The freehold never could be in abeyance, because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his *præcipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*. The statute of *quia emptores terrarum*, and other statutes which extended the power of alienation to the king's tenants *in capite*, the frequent releases of feudal services, the statutes of uses and wills, and, at last, the total abolition of all military tenures, have left little more than the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the things originally signified by these sounds. The idea which modern times

times annex to freehold or freeholder, is taken merely from the duration of the estate. Copyholds, and the customary freeholds in the North, retain some faint traces of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that, usurping such copyhold or customary tenure, is a different fact from a naked possession or occupation of the land; but whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisin, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that, formerly, it was as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation. Disseisin is a complicated fact, and differs from dispossessing. The freeholder by disseisin differs from a possessor by wrong. *Bracton* puts many cases of possession wrongfully taken, which he calls intrusion, because there was no disseisin, *possessio quæ nuda est omnino, et sine aliquo vestimento quæ dicitur intrusio*. A particular tenant, according to the feudal notions was in as of the seisin of the fee, of which his estate was a part; if he aliened the fee, which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held, he forfeited his particular estate, for having betrayed his seisin with which he was intrusted. But, on account of the privacy and confidence between him and the reversioner, and the notorious solemnity of the act of investiture,

his feoffment disseised the reversioner. *Bracton* mentions the disseisin in this case, as a necessary consequence, and as a thing which could not possibly be otherwise;—*item facit quis disseisinam cum quis in seifina fuerit ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo, alium feoffaverit in prejudicium veri domini et fecerit alteri liberum tenementum; cum duo simul et semel de eodem tenemento et in solidum esse non possunt in seifina.* He considered it as impossible for the true tenant not to be put out, when the other actually came into his place. So late as the 32 *Eliz.* in the case of *Mathefon v. Trot*, 1 *Leon.* 209, the distinction upon which the judgment turned, was, “that *Henry Denny* gained a wrongful possession in fee, but did not gain any seisin, so no disseisor, therefore the descent to his heir was not privileged.” The precise definition of what constituted a disseisin, which made the disseisor tenant to the demandant’s *præcipe*, though the right owner’s entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded; for, after the assize of novel disseisin was introduced, the Legislature, by many acts of parliament, and the courts of law, by liberal constructions in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property, if, by bringing his assize, he thought fit to admit himself disseised. The law books treat of disseisin with a view to the assize, which was the common method of trying titles till ejectment came into use.

use. *Littleton*, who wrote long after the remedy by assize was enlarged by statutes, and, by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize. These are the common places from whence many descriptions have been cited of a disseisin; but such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant and freeholder *de facto* in spite of the true owner. Though the term *disseisin* happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin, or disseisin by election, is very different. This distinction of disseisin at election is made in the case of *Blundel v. Baugh*, *Cro. Car.* 302. In a manuscript report of this case, much fuller than the printed one, the three judges, with whom agreed the four Judges of the Common Pleas, argued and held, “ that the lessee for years of
 “ the tenant at will was a disseisor, at the election of
 “ the original lessor, for the sake of his remedy, but
 “ never could be looked upon as the freeholder, or a
 “ disseisor in spite of the owner, or with regard to
 “ third persons.” And the manuscript note says, if a *præcipe* was brought against him, he might say, “ I
 “ am not tenant to the freehold.” If a lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will consider himself as disseised, or not. *Metcalfé ex dem. Parry*, and others, which was a case re-

served at *Salop* assizes, 25th *March* 1743, for the opinion of the Court of Exchequer, who gave judgment on the 24th of *November* 1743, was thus: Tenant in tail of lands leased by his father to a second son for lives, (under a power), upon his father's death received the rent from the occupier, as owner; and, as if no such lease had been made, he suffered a common recovery: it was held, that this was only a disseisin of the freehold at election, and that, therefore, he could not make a good tenant to the *præcipe*, and the recovery was adjudged bad. I will now consider, whether *James Earle* can be deemed a good tenant of the freehold by disseisin. Disseisin is a fact, it is not found; all the jury say is, that soon after the judgment in ejectment, Sir *Robert Atkyns* entered, and was in possession. This must be taken to be an entry in consequence of the judgment; it was so considered on settling the special verdict, otherwise the defendants have no case; for it is not found that Lady *Atkyns* was ever ousted, or quitted the possession, or that Sir *Robert* was ever seised. Taking possession under a judgment in ejectment, never could be a disseisin of the freehold. Suppose it a real proceeding, the termor of a disseisee might, by the old law, recover against the disseisor, he might recover against the feoffee of his lessor, but he could never thereby become a disseisor of the freehold; he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had enfeoffed, it enured to the alienee: if the lessor

was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who, in that case, had the right of possession. Suppose the proceeding (as it is) a fictitious remedy, then in truth and substance a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed, according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. It is found that the ejectment was brought by Sir Robert Atkins to recover the possession, but it is not found that he claimed the freehold. The title must now be taken as in the special verdict, therefore it appears that he had no right to the possession. His feoffee could be in no other condition than himself; he had a possession without prejudice to the right, and could convey no other. He was not in as a particular tenant; there was no privity of any seisin, he had only a naked possession. But the case is still stronger; the true owner cannot even elect to make a person in possession, under a judgment in ejectment, a disseisor. He could not bring an assize of *novel disseisin*; the entry is not *injste et sine judicio*, but under the authority of a court of justice, and therefore lawful. There is still behind, though it happens not to be necessary, a larger ground upon which to determine this question, and more satisfactory,

tisfactory, because more intelligible, from the nature of a common recovery now, and a feoffment to make a tenant to the *præcipe* with that view only. The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it. Nothing could be more agreeable to the law of tenures than a male fee unalienable; but this bent to set property free allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture. No sooner had the statute *de donis* repeated what the law of tenures said before, that the tenor of the grant should be observed, than the same bent permitted a tenant in tail of the freehold and inheritance to make an alienation voidable only under the name of a discontinuance; but this was a small relief. At last, the people having groaned for two hundred years under the inconveniences of so much property being unalienable, and the great men, to raise the pride of their families, and, in those turbulent times, to preserve their estates from forfeiture, preventing any alteration by the legislature, the same bent threw out a fiction in *Taltarum's* case, by which tenant in tail of the freehold and inheritance, or with the consent of the freeholder, might alien absolutely. Public utility adopted and gave a sanction to the doctrine, for the real political reason, to break intails; but the ostensible reason from the fictitious recompence hampered succeeding times how to distinguish cases

cases which were within the false reasoning given, but not within the real policy of the invention, till at last the legislature applauded common recoveries by a variety of statutes. As the legislature has for ages avowed the proposition, we may now say, that common recoveries are a mere form of conveyance, all necessary circumstances of form and ceremony are taken from its fictitious original. The policy of this species of alienation meant to take a middle way as to entails between perpetuities and absolute property; alienations were allowed, yet in such a shape as necessarily required deliberation and delay; and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with the consent of the owner of the first estate for life, the eldest son was restrained in the lifetime of his father or mother, or any other ancestor or relation seised for life under a family settlement. The act of 14 *Geo. 2.* proceeds upon the parties to a recovery having power to suffer it: Sir *Robert Atkyns*, the son, had no right to suffer a common recovery, without the concurrence of the jointress; any contrivance therefore to do it, without her joining, is artifice and evasion. If tenant in tail in possession is disseised, though the *præcipe* be brought against the disseisor, yet, if he is vouched, the recovery shall bar, because he had power to bar. In *Jennings's* case, 10 *Co. 44.* the recovery is supported, because the parties had power to bar; by parity of reason this recovery ought not to be supported, because the parties had no power; if it was, the law must be overturned.

Every,

Every remainder-man in tail might easily get a naked possession, and make a secret feoffment. The plan of marriage, and other family settlements, is to limit a remainder to the first and every other son in tail; the negative which the father now has upon the eldest son's suffering a common recovery, is the very means and consideration of getting the estate re-settled upon the marriage of the eldest son. By this method, the moment he attains to the age of twenty-one years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection. If before the introduction of common recoveries, as a conveyance, this question had been agitated in an adversary real action, upon a plea, that *Earle* was not tenant to the freehold, it would have been adjudged from the law, and artificial learning of tenures, that he could not be so considered. If the question had been, whether tenant in tail in remainder should, by such an injurious entry and feoffment, acquire a benefit to himself, to the prejudice of his reversioner, it would have been adjudged, from eternal principles of justice, that an act founded in wrong, should not, by virtue of the crime itself, become legal for the author's advantage; as it is now agitated, when common recoveries are established as a species of alienation, the only question is, whether the rule of law, which requires the concurrence of the owner of the first estate for life, shall be overturned? It is better to subvert the rule directly, than suffer it to be done

done by a secret injurious entry and feoffment, which cannot be prevented, and which the owner may never hear of. There is no injury or wrong, for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow too late, unless the entry of the tenant for life shall avoid the recovery; if it would, there is an end of the present question, for the jointress entered, and was intitled to the profits from Sir *Robert Atkyns* as a trespasser *ab initio*.

In every light, and upon every ground of law, this recovery is bad.

Notwithstanding these arguments, judgment was unanimously given for the defendant, on the ground that the plaintiff was barred by the statute of limitations, the ejectment not having been brought within twenty years after the lessor's title accrued. A writ of error was brought in the House of Lords, where it was also determined that the plaintiff was barred by the statute of limitations.

Vide Tit. 31.
c. 2. l. 20.

John Atkyns, the plaintiff in this cause, having died without issue, the person who was next in remainder under the will of Sir *Robert Atkyns*, brought an ejectment for the recovery of the same premises: and the validity of this recovery having been again discussed in the Court of King's Bench in *Mich. 18 Geo. 3.* Mr. Justice *Aston* delivered the opinion of himself, Mr. Justice

Justice *Willes*, and Mr. Justice *Ashburst*, (Lord *Mansfield* being absent) that the recovery was void, because *James Earle* was not a good tenant to the *præcipe*, and judgment was therefore given for the plaintiff. The arguments which were made on that occasion are very accurately reported by Mr. *Cowper*; but as they are the very same which had been used on the former hearing, it is unnecessary to state them.

Cowper's
R. 689.

Bargain and
Sale inrolled.
Hynde's Case,
4 Rep. 71.
Forrester,
167.

§ 42. A good tenant to the *præcipe* may be made by bargain and sale inrolled; and the bargainee may appear and vouch before entry, or before the bargain and sale is inrolled, provided it be inrolled within six months, as prescribed by the statute; for although the freehold does not pass from the bargainor until the inrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor, at the time when the bargain and sale was executed, by relation. And as common recoveries are much favoured by the courts of law, a bargain and sale to make a tenant to the *præcipe* will not be deemed void on account of any trifling mistake or inaccuracy.

Vide *Lloyd v.*
Lord Say
and *Sele*,
Tit. 32. c. 23.
f. 16.

Lease and
Release.

§ 45. A tenant to the *præcipe* may also be made by lease and release; and the reservation of a pepper-corn in the bargain and sale for a year, is a sufficient consideration to raise a use in the bargainee, so as to make

Barker v.
Keate,
Tit. 32. c. 13.
f. 13.

make the release valid, for the purpose of supporting a common recovery.

§ 46. We have seen, that, in general, a common recovery cannot be valid without a tenant to the *præcipe*. Yet, in some cases, a common recovery may operate by estoppel, although there be no tenant to the *præcipe*; but this is only where the person who suffers the common recovery is tenant in fee, for the issue in tail cannot be bound by estoppel, as they do not claim from their immediate ancestors, but from the first purchasers, *secundum formam doni*.

A Recovery may, in some Cases, be good without a Tenant to the *Præcipe*.
10 Mod. 45.
Godb. 147.

§ 47. Common recoveries having been long considered by the Judges, and also by the legislature, as common assurances, every sort of favour has been shewn them; and as the validity of recoveries has frequently been called in question, on account of irregularities in making a tenant to the *præcipe*, the following statute was made to obviate that inconvenience.

Statute
14 Geo. 2.

Secl. 5. “Whereas it has frequently happened, that
“the deeds for making the tenant to the writs of en-
“try, or other writs for common recoveries, have
“been lost, or that the fines or deeds, making the
“tenants to the said writs, have not been levied or
“executed till after the judgment given in such reco-
“veries, and the writ of seisin awarded; by reason
“whereof

14 Geo. 2.
c. 20.

“ whereof great doubts have arisen whether such
 “ recoveries, for want of proper tenants to the writs,
 “ are good and effectual in law: to prevent such
 “ doubts for the future, and in order to render com-
 “ mon recoveries more certain and effectual, be it
 “ enacted, that every common recovery already suf-
 “ fered, or hereafter to be suffered, shall, after the
 “ expiration of twenty years from the time of the suffer-
 “ ing thereof, be deemed good and valid to all intents
 “ and purposes, if it appears upon the face of such
 “ recovery that there was a tenant to the writ;
 “ and if the persons joining in such recovery had a
 “ sufficient estate and power to suffer the same,
 “ notwithstanding the deed or deeds for making
 “ the tenant to such writ should be lost, or not
 “ appear.”

Sec. 6. “ And be it further enacted by the autho-
 “ rity aforesaid, that, from and after the commence-
 “ ment of this act, every recovery already suffered,
 “ or hereafter to be suffered, shall be deemed good
 “ and valid to all intents and purposes, notwithstand-
 “ ing the fine, or deed or deeds, making the tenant
 “ to such writ, should be levied or executed after the
 “ time of the judgment given in such recovery, and
 “ the award of the writ of seisin as aforesaid, pro-
 “ vided the same appear to be levied or executed
 “ before the end of the term, great session, session, or
 “ assizes, in which such recovery was suffered, and
 “ the persons joining in such recovery had a suf-
 “ ficient

“ ficient estate and power to suffer the same as
“ aforesaid.”

§ 48. In ejectment, the jury found a special verdict that *Sarah Williams*, being tenant in tail of the premises in question, conveyed the same by lease and release, dated the 19th and 20th of *November* 1778, to a person to make him tenant to the *præcipe*, in order that a common recovery might be suffered, which was accordingly suffered, and a writ of seisin awarded, tested the 6th of the same month of *November*, returnable in 15 days of *St. Martin*; to which the sheriff returned, that he, by virtue of the said writ, on the 10th of *November* in the same term, did cause full seisin of the premises therein mentioned to be delivered to the demandant. It was contended, that this recovery was void, for it appeared upon the record, that seisin was delivered by the sheriff ten days before the date of the conveyance to the tenant of the freehold, when in fact, *Sarah Williams* was in possession of the lands; and that this case was not within the statute 14 *Geo. 2. c. 20. s. 5.* which arose from the fictitious relation to the first day of the term, and was made for a different purpose, viz. to prevent recoveries being set aside where the tenant to the *præcipe* was created by deed executed after the award of the writ of seisin. The words of the 6th section of the act were, “ executed after the time
“ of the judgment given and the award of the writ of
“ seisin.” But there was a material difference between the award and the execution of the writ; and the 7th

Goodright
ex dem. Bur-
ton v. Rigby,
H. Black.
Rep. vol. 2.
46.

Pigot 58.
Willson on
Fines 348.

and 8th sections expressly provide, that the act should not be extended beyond its strict limits. The counsel on the other side were stopped by the court, who said, that though there might have been some doubt, if it had been found a fact, that seisin was actually given on the 10th of *November*, yet the day named in the return was immaterial; for it was not necessary to name any particular day, and the return would have been good without it. All that was necessary was, that seisin should be delivered after the judgment, and before the return of the writ, and that the proceedings should all be in the same term. That those requisites were complied with in the present case, which was directly within the statute 14 *Geo.* 2. f. 5. and 6. As, therefore, the day mentioned in the sheriff's return was repugnant to the rest of the proceedings, it was to be rejected, and there must be judgment for the defendant.

Durnford and
East's Rep.
vol. 5. p. 177.

A writ of error was brought upon this judgment in the Court of King's Bench. Lord *Kenyon* observed, that the sense of the clause in the statute 14 *Geo.* 2. was, that the recovery should be valid, provided the deed making a tenant to the *præcipe* was executed before the end of the term in which the recovery was suffered: and it appeared upon this verdict, that the deeds making the tenant to the *præcipe* were executed within the term. And though the statute, in enumerating some of the defects for which remedy was to be applied, does not mention this particular defect, it has
always

always been understood, that the act was intended to remedy every defect of this kind, provided that, which is there made a condition, be complied with, namely, the making of the tenant to the *præcipe* before the end of the term in which the recovery is suffered; nor could the words of the statute be satisfied by any other construction. The other Judges concurred in opinion with the Lord Chief Justice, and the judgment was affirmed.

TITLE XXXVI.

RECOVERY.

CHAP. IV.

Of Voucher.

- | | |
|---|--|
| § 1. <i>Nature of.</i> | 12. <i>Rules of Court respecting Warrants of Attorney.</i> |
| 4. <i>Of vouching in Person or by Attorney.</i> | 15. <i>Of the Writ of Summons ad Warrantizandum.</i> |

Section 1.

Nature of.

IN describing the manner of suffering a common recovery, it has been said, that when the tenant to the *præcipe* appears in court to answer the demandant's writ, he, instead of defending the title to the land, calls on another person, who is supposed to have warranted the title to him at the time of the original purchase, and prays, that the said person may be called in to defend the title which he warranted, or otherwise to give lands of equal value to those which he shall lose by the defect of his warranty.

§ 2. Where the *præcipe* is brought against the tenant in tail who vouches over the common vouchee, the recovery is said to be with single voucher. Where the *præcipe* is brought either against a prior tenant for life, or the alienee of the tenant in tail who vouches the tenant in tail, who comes upon the voucher and vouches

vouches over the common vouchee, the recovery is then said to be with double voucher.

§ 3. In all real actions the demandant has a right to counterplead the voucher, (that is) to shew in his replication, that the tenant ought not to be allowed such a voucher; and the vouchee might also counterplead the warranty, by shewing, that he was not obliged to warrant the lands to the tenant. But when a person is vouched to warranty, and enters of his own accord into the warranty, the law presumes, that he parted with his first possession with warranty; and comes in now to warrant the same possession, otherwise he would not enter into the warranty, but would counterplead it, for he might demand the lien: and even if the tenant shewed a lien, he might counterplead it. But if he enters into the warranty without demanding a lien, no person can afterwards aver, that there was no warranty; for when the vouchee, by entering into the warranty, binds himself to render in value, in case the demandant recovers, the cause of the warranty is not examinable, either by a privy or a stranger; because the law will presume, that the vouchee was compellable to enter into the warranty, otherwise he would never run such a risk.

Pigot 15.

Idem.

§ 4. If the vouchee is present in court, he immediately enters into the warranty, in which case the entry in the record is thus: "And the said William, in his proper person, cometh and defendeth his right; when, &c. and thereupon voucheth to warranty Roger Blagrave, Esquire, who is present here

Of vouching
in Person, or
by Attorney.

“ in court, in his proper person, and freely warranteth
 “ to him the tenements aforefaid.”

§ 5. It frequently happens, that neither the tenant nor the person vouched can conveniently appear personally in court, in which case they make a warrant of attorney to some other person to appear in their stead. The warrant of attorney is thus:—“ *A. B.*
 “ puts in his place *C. D.* and *E. F.* his attornies,
 “ jointly and severally against *I. B.* to gain or lose in
 “ a plea of land, &c.” If the person who comes in as vouchee makes a warrant of attorney, it is thus:—
 “ *I. K.* whom *A. B.* voucheth to warranty, putteth
 “ in his place *L. M.* and *N. O.* his attornies, jointly
 “ and severally against *I. B.* to gain or lose in a plea
 “ of lands, &c.”

§ 6. The warrant of attorney must be acknowledged either before a judge, who must sign it, or the justices of assize where the lands lie, or else before commissioners appointed by writ of *dedimus potestatem de attorney faciendo*, who must certify the names of the persons whom the tenant or vouchee appoints for his attornies, under their hands and seals.

§ 7. By the statute 23 *Eliz. c. 3. s. 5.* it is enacted, that every person, who shall take the knowledge of any warrant of attorney of any tenant or vouchee for suffering of any common recovery, shall, with the certificate of the warrant of attorney, certify also the day and year whereon the same was acknowledged. And that no person who takes any such knowledge of any
 warrant

warrant for any recovery, shall be bound to certify such warrant, except it be within one year next after the said knowledge taken; and that no clerk or officer shall receive any writ of entry, whereupon any common recovery is hereafter to pass, unless the day of the knowledge of the warrant shall appear, in or by such certificate.

§ 8. This writ of *dedimus potestatem* is not founded Fitz. N.B. 17. on the statute of *Carlisle*, which only extends to persons who acknowledge fines, but is a writ which was provided by the common law, enabling persons, who could not appear in court, to appoint attornies in their stead.

§ 9. Where a common recovery is suffered in this manner, the warrant of attorney is the foundation of the recovery, all the subsequent proceedings being in fact mere matters of form; but still the acknowledgment of a warrant of attorney may be void, and of consequence the recovery suffered pursuant to such a warrant of attorney, on account of any legal disability in the person who acknowledges it, and such disability may be averred, in which it differs from the acknowledgment of a fine before commissioners appointed by a writ of *dedimus potestatem*, for the acknowledgment of a fine is the assent of the party to the accommodation of the suit; by which it is absolutely compleated, and the entry of the concord is the same as entering up judgment; but the acknowledgment of a warrant of attorney to suffer a common recovery is nothing more than a judicial mode of appointing another per-

son to appear in court for the tenant or vouchee, and is no part of the record; hence these two acts are attended with very different consequences.

Vide infra
Wynne v.
Wynne.

§ 10. It follows from these principles, that if a tenant or vouchee, who has appointed an attorney, for the purpose of suffering a common recovery, dies before such attorney has actually appeared for him, the recovery will be void; because the death of such tenant or vouchee is a determination of the warrant of attorney, and this circumstance may be averred, it not being contrary to the record,

Vide infra
Sir N. Bacon's Case.

§ 11. If the warrant of attorney appears to have been given after judgment, the recovery will be void; for the writ of *dedimus potestatem de attornato faciendo* recites, that the writ of entry is pending, which is not the case after judgment: and the appearance of the attorney before the warrant was made, is without authority, and therefore void.

Rules of
Court respecting
Warrants
of Attorney.

§ 12. By a rule of court, made in *Hil. 14 Geo. 3.* for the more effectual and certain proof of the due acknowledgment of warrants of attorney, taken from the tenants or vouches in common recoveries, by virtue of any writ of *dedimus potestatem*, it is ordered by the court, “ that no common recovery, wherein
“ the tenant or tenants, vouchee or vouches, or any
“ of them, shall appear and defend by attorney, shall
“ be arraigned at the bar, unless an affidavit or affi-
“ davits, in writing, on parchment, shall be made
“ and annexed to a copy of the *præcipe*, and warrant
“ or

“ or warrants of attorney, acknowledged by such
 “ tenant or tenants, vouchee or vouchees, by virtue
 “ of any writ or writs of *dedimus potestatem*, in which
 “ affidavit or affidavits, the person or persons making
 “ the same, shall swear that he or they knew the party
 “ or parties acknowledging such warrant or warrants
 “ of attorney; that the same was or were duly signed
 “ and acknowledged, upon the day and year, or several
 “ days and years mentioned in the caption, or
 “ several captions thereof, that the party or parties
 “ acknowledging, and also the commissioners taking
 “ the same, were all of full age and competent understanding.
 “ That the females covert (if any) were
 “ solely and separately examined apart from their husbands,
 “ and freely and voluntarily consented to acknowledge the same.
 “ That all the said parties
 “ knew the same warrant or warrants of attorney was
 “ or were intended for suffering a common recovery
 “ to pass his, her, or their estate or estates. And
 “ further, that the rasure or razures, interlineation
 “ or interlineations, (if any) in the body or caption
 “ of such original warrant or warrants of attorney,
 “ was or were made before the said parties, or any of
 “ them signed the said warrant or warrants, and before
 “ the commissioners signed the said caption or captions;
 “ which affidavit or affidavits (together with the
 “ said copy of the *præcipe*, and warrant or warrants
 “ of attorney, whereunto the same shall be annexed)
 “ shall be filed in the office of enrollment of writs for
 “ fines and recoveries. And it is ordered, that all and
 “ every such affidavit or affidavits, as aforesaid, shall be
 “ made by some attorney or attornies of the courts of

“ *Westminster-hall*, or of the sessions in *Wales*, or of
 “ the counties palatine of *Chester*, *Lancaster*, or *Dur-*
 “ *ham*; and shall be sworn before a person duly
 “ authorized to take affidavits in this court, except
 “ where the party or parties respectively, at the time
 “ of their acknowledging such warrant or warrants of
 “ attorney, shall be in that part of *Great Britain*
 “ called *Scotland*, or in *Ireland*, or in some other
 “ parts beyond the seas. And in case the said party
 “ or parties shall be in *Scotland*, then the said affidavit
 “ or affidavits shall be made by one of the clerks of
 “ his Majesty’s signet, and sworn before one of the
 “ Judges, or other person duly authorized to take
 “ affidavits or depositions, in the Court of Session, or
 “ Court of Exchequer, in that part of the united
 “ kingdom. But if the said party or parties shall be
 “ in *Ireland*, or in any other parts beyond the seas,
 “ then the said affidavit or affidavits shall be made by
 “ one of the commissioners who hath taken the ac-
 “ knowledgment of such warrant or warrants of
 “ attorney, and shall be sworn either before some
 “ person duly authorized to take affidavits in this
 “ court, or before some magistrate of the place where
 “ such acknowledgment shall be taken, having autho-
 “ rity to administer an oath, and in the presence of a
 “ public notary, which notary shall also certify in
 “ writing, under his hand and seal, as well the due
 “ administering of the said oath, as also the name,
 “ signature, and office of the magistrate administering
 “ the same.”

§ 13. By a rule of court *Mich. 29 Geo. 3.* it is ordered, that no common recovery be suffered to pass, unless the taking of the warrants of attorney be before one of the Justices or Barons of his Majesty's courts of record at *Westminster*, or one of the Serjeants at Law, unless an affidavit be made and filed, stating that the commissioners taking the same are either barristers of five years standing, or solicitors or attornies of some of the courts in *Westminster-hall*, the Judges of the Court of Session or Exchequer, or advocates or clerks of the signet of five years standing in *Scotland*.

Ex parte
Worseley,
2 H. Black.
R. 275.

§ 14. By a rule of the Court of Common Pleas made *Trin. 30 Geo. 3.* it is ordered that, from and after the first day of *Mich.* term then next ensuing, in every common recovery wherein the tenant or tenants, or the vouchee or vouchees, warrant or warrants of attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe*, and of such warrant of attorney having such affidavit or affidavits as is or are required by the rule of this court made in *Hil. 14 Geo. 3.* thereto annexed the *allocatur* of the Lord Chief Justice, or some one other of the justices of this court, in the same or like manner as *allocaturs* are now written on fines taken by *dedimus potestatem*; and the copy of the *præcipe* and warrant or warrants of attorney with the *allocatur* thereon, shall be filed as directed by the said rule; and that at the time of signing such *allocatur*, the writ of entry for such common recovery shall be produced before the judge signing such *allocatur*, who may mark such writ with his title, name, or initials thereon; and
such

1 H. Black. R.
P. 527.

such writ shall also be produced at the time of the arraignment of such recovery.

Of the Writ
of *Summoneas*
ad *Warranti-*
zandum,
1 Leon. 86.

§ 15. If the person whom the tenant vouches is not in court, then a writ called a writ of *summoneas ad warrantizandum* issues to compel the person called upon to appear in court, and warrant the lands.

Booth 43.
Pigot 148.

§ 16. In adversary suits, if upon a *summoneas ad warrantizandum*, the sheriff returned the vouchee summoned, and the vouchee made default, a *capias ad valentiam* issued for the tenant; but if the sheriff returned *nihil* upon the summons, an *alias* and a *pluries* issued, and then a *sequatur sub suo periculo*. And if the vouchee still made default, judgment was given for the demandant, but no judgment was given for the tenant, because it appeared that the vouchee had not affeils.

§ 17. Where the vouchee appears by attorney, the warrant by which he constitutes an attorney ought to bear date after the teste of the writ of summons; but however the omission of this circumstance will not invalidate a recovery.

Wynne v.
Lloyd,
1 Lev. 130.
Sir T. Ray.
16.
1 Sid. 213.
1 Keb. 459.

§ 18. Thus in a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the writ of *summoneas ad warrantizandum* issued, but it was answered that the vouchee might appear in person without any summons, and therefore the recovery was good, and the process void. And the court said, that
a common

a common recovery being a common assurance, they would intend another warrant of attorney made in due time.

§ 19. When the vouchee has entered into the warranty, he comes in *loco tenentis*; and, in judgment of law, is tenant to the demandant. And then the demandant counts against him as he did before against the tenant, and the vouchee may plead all those pleas which the tenant might have pleaded, and also any pleas which may arise after he has entered into warranty. 1 Inst. 265 b.

§ 20. Thus if a *præcipe, quod reddat*, is brought against *A.* who vouches *B.* who enters into warranty, and afterwards the demandant releases all his right to *A.* although *A.* himself cannot plead this release, because from the time when *B.* entered into the warranty *A.* is not before the court, yet *B.* may plead this release, or may plead a release to himself from the demandant. Jenk. Cent. 100.

§ 21. The demandant may release to the vouchee, although the vouchee has nothing in the land; for when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him, on account of the privity which is between them. 3 Rep. 29.

§ 22. If a fine be levied by a vouchee to the demandant, or by the demandant to a vouchee, it will Idem.

be good, because the vouchee is supposed to have the freehold.

§ 23. By the common law, a writ of *summoneas ad warrantizandum* had nine returns. By the statute 16 Car. 2. c. 16. s. 10. the returns were abridged to five; and now, by the statute 24 Geo. 2. c. 48. s. 8. they are reduced to four inclusive; as if the writ of entry is returnable on the morrow of *All Souls*, then the writ of *summoneas* must be returnable from the day of *St. Martin* in fifteen days, being the fourth and last return of *Michaelmas* term. And if there are three vouchers, the writ of summons for the second vouchee is to be returnable four returns (both inclusive) from the return of the summons of the first vouchee; and writs of summons are tested four days inclusive, from the writ of entry.

§ 24. The Court of Common Pleas will not enlarge the return of a writ of summons, so as to make a term intervene between the teste and the return.

Barnard v.
Woodcock,
2 Black. R.
1201.

§ 25. Thus, where a motion was made in *Easter* term 18 Geo. 3. that the writ of summons in five recoveries might be tested in the *Michaelmas* term preceding, and be made returnable in that *Easter* term, instead of the usual course, authorized by the statute 24 Geo. 2. c. 48. which is, that it should be tested the fourth day inclusive, from the return of the writ of entry, and be returnable the fourth return after the return of the writ of entry; in consequence of which,
writs

writs of summons must be returnable either in the same term in which they were tested, or, at farthest, in the very next term.—The occasion of this application was, that Earl *Cowper*, the vouchee, had acknowledged the warrants of attorney to appear to the summons, before commissioners appointed by *dedimus* (which recited the summons as returnable in the preceding *Hilary* term) at *Florence*, on the 13th *December*, 1777, but they did not arrive in *England* till after the end of *Hilary* term; and as the return is usually of the same term wherein the recovery is in fact arraigned at bar, and the *teste* must precede the actual acknowledgment of the warrant of attorney by the vouchee, this proceeding could not be made regular, without suing out a writ of summons with a much longer return than the course of practice will at present allow. The like inconvenience must occur whenever the vouchee dwells in any distant country, as the *East* or *West Indies*; but that objection had been used to be cured in a very unwarrantable manner, by altering the date of the caption after it arrived in *England*, so as to suit the term in which the recovery was arraigned; till the late rule of the court in *Hilary* term 14 *Geo.* 3. (which directs *inter alia* an affidavit to be made of the true time of taking the caption) put a stop to this, among other gross irregularities in the practice of suffering recoveries.

The court conceived that they had not power to make such a rule, or at least, that as they could not foresee all its consequences, it would be highly imprudent to authorize such a proceeding, by a previous

direction from the bench; but intimated, that no blame should fall on the officer, who should make out the process as prayed for, but the same to be at the hazard of the parties, and without prejudice to any future question that might arise, on the validity of such recoveries.

Gibbons v.
Stevenson,
2 Black. R.
1223.

§ 26. A motion, similar to this one, was made in *Mich. 19 Geo. 3.* and received the same denial from the court. The facts were, that the *dedimus* was tested the 26th *February*, 1777, and recited a writ of summons, returnable the first day of *Easter* term, 1777; so that, properly, the summons should have been returnable, and the recovery had, in *Hilary*, 1778, which the distance rendered impossible.—Therefore, on application to the Master of the *Rolls*, he ordered the curfitor to make out a writ of entry, returnable in *Michaelmas* term, 1777; upon which the officer made out a writ of summons, returnable in the next *Hilary* term, of which term the tenant's appearance was entered. And then they imparled from *Hilary* to *Easter*, from *Easter* to *Trinity*, and from *Trinity* to *Michaelmas*, when the recovery was arraigned. And if the vouchee was then living, it was apprehended that the recovery would be valid; but, if he was dead, it would be erroneous.

TITLE XXXVI

RECOVERY.

CHAP. V.

Of Judgment.§ 1. *Nature of.*5. *Relation of Judgments to the
First or other Day of
Term.*§ 15. *Judgment cannot be given on
a Sunday.*

Section 1.

IN Consequence of the default made by the person who is last vouched in a common recovery, and his departure in despite of the court, judgment is given that the demandant shall recover seisin of the lands in question, and that the tenant shall recover against the vouchee, lands of equal value to those warranted by him, and now lost by his default. And as soon as judgment is given, the recovery becomes binding on all the parties to it, and their heirs. Nature of.

§ 2. The entry of the judgment upon the record is thus: “ therefore it is considered, that the aforesaid
“ *W. G.* do recover his seisin against the said *W. L.* of
“ the tenements aforesaid, with the appurtenances,
“ and that the said *W. L.* have of the lands of the
“ aforesaid *W. G.* to the value,” &c.

§ 3. If

§ 3. If judgment be given in a common recovery, before the return of the writ of entry, or the return of the writ of *summoneas ad warrantizandum*, it is void, because the court has no power to proceed until the return of the writ of entry, and the appearance of the vouchee; for the parties are not supposed to appear until the return of that process, which issues for the sole purpose of bringing them into court.

§ 4. In every species of action, the death of either of the contending parties puts an end to the suit; and, therefore, in a common recovery, if either the demandant, the tenant, or any of the vouchees dies before judgment is given, the recovery is void.

Relation of
Judgments to
the First or
other Day of
the Term.

4 Rep. 71 a.
2 Black. Rep.
735.
1 Stra. 18.
Pigot 59.

§ 5. Judgments, however, are not always considered as having been given on the day on which they are pronounced, but have frequently a relation to the first or some other day of the term in which they are given: and if all the parties are living on the day to which the judgment relates, the recovery will be good, for the judges take no notice of the day on which the recovery was passed in court.

Cro. Car.
102.
1 Bulst. 32.
35.
3 Durnford
and East's
Rep. 185.

§ 6. The term in law is considered to many purposes as but one day; and, therefore, if judgment be given at any time during a term, it relates to the first day of that term, and is considered in law as having been given on that day; and the first day of term is the *effoin-day*, for the *quarto die post* is only a day of grace.

§ 7. However,

§ 7. However, if a writ of entry is returnable on the second, or any other return-day of the term, judgment will then relate to that return-day, and not to the first day of the term; for the courts will not consider the judgment in a recovery to have been given prior to the return of the writ of entry. And where the term, by the proceedings in it, suffers a division, as, where any process issues, during the continuance of the term, then the judgment relates to the effoin-day of the return of that process, and not to the first day of the term.

Selwin v.
Selwin,
2 Bur. 1131.

§ 8. It follows, from these positions, that when the vouchee in a common recovery, appears in person at the return of the writ of entry, then the judgment relates to the return-day of the writ of entry, and is considered, in law, as having been given on that day; but if the vouchee appears upon a writ of *summoneas ad warrantizandum*, then the judgment relates to the day of the return of that writ.

§ 9. Thus, where *Edward Shelley* suffered a common recovery, in which he was vouched by attorney on the 9th day of *October* (which was then the first day of *Michaelmas* term), and died before six in the morning of that day; the recovery was passed that day about ten o'clock, and it was adjudged that the death of *Edward Shelley* did not invalidate the recovery, for the writ of entry was returnable on the *eclatve* of *St. Michael*, and the judgment had relation to that day, which was the said 9th day of *October*, on which day the vouchee was alive, and the law makes no fractions of a day.

Shelley's
Case, 1 Rep.
93. Moor 136.
Jenk. Cent.
249.

§ 10. If a warrant of attorney bears date after the return-day of the writ of entry on which a recovery is suffered, the recovery will be void; because the judgment relates back to the return-day of the writ of entry.

Sir Nich.
Pacon's Case,
Dyer 220.

§ 11. Thus, where the writ of entry was returnable on the *octave* of *St. Michael*, which was the 9th day of *October*, the writ of *dedimus potestatem de attornato faciendo* bore date the 11th of *October*, and the *mittimus* thereof bore date the 30th of *October*; the recovery was adjudged to be erroneous, because the judgment, on whatever day of the term it was given, related back to the return-day of the writ of entry, which was the first day of the term, so that the warrant of attorney was made after the time when the judgment was supposed to be given.

§ 12. If a vouchee in a common recovery, who comes in upon a writ of *summoncas ad warrantizandum*, and appears by attorney, dies before the return of the writ of *summoneas*, the recovery is void; because the judgment could not possibly have been given in such recovery until the vouchee had appeared in court and made default; and as the vouchee could not appear until the return of that process, which issued for the sole purpose of bringing him into court, it follows, that judgment must have been given after the death of the vouchee, which was a determination of the warrant of attorney; and these facts being collateral to the record, may be assigned for error.

§ 13. Thus,

§ 13. Thus, in a writ of error to reverse a common recovery, it appeared by the record, that a writ of entry *sur disseisin en le poſt* was brought by Sir *Watkin Williams Wynne*, returnable *quinden. Paſch. 13 Geo. 2.* againſt *William Thomas*, who appeared in perſon and vouched *James Apperley* and *Alithea* his wife; whereupon a writ of *ſummoneas ad warrantizandum* was awarded, returnable in *craftino aſcenſionis domini* (which was on the 16th of *May*), on which day the ſaid *James Apperley* and *Alithea* his wife appeared by *Joſiab Hodſon* their attorney, and entered into warranty, and vouched over the common vouchee, who made default, whereupon judgment was given, and a writ of *ſeiſin* awarded; and the ſheriff returned that he had delivered *ſeiſin*. The error aſſigned was, that *Alithea* died before judgment was given in the ſaid recovery, and for this the plaintiff in error prayed, that the recovery might be reversed. Iſſue was joined, that *Alithea* did not die before judgment. A ſpecial verdict was found, that *Alithea* died on the 10th day of *May*, fix days before the return of the writ of *ſummoneas ad warrantizandum*, but whether ſhe died before judgment or not, the jurors left to the opinion of the court. This caſe was argued on behalf of the plaintiff in error, by Mr. *Clive*, who made two points; firſt, That the death of *Alithea Apperley*, vouchee and tenant in tail, as found by the ſpecial verdict, made the judgment in the common recovery erroneous. Secondly, That upon the whole record, and the continuances as entered, the judgment appeared to be given, and the recovery paſſed, after the death of the vouchee, and could not be made good by relation, as a judgment of recovery in her

Wynne v.
Wynne,
1 Will. R.
35.

MSS. note.

lifetime. In support of these positions, he argued, that recoveries were erroneous, where the vouchee or other necessary party did not appear, either in person or by attorney; for, without an appearance, there could be no warranty, no vouching over the common vouchee, and, consequently, no judgment. In this case, *Alithea*, the vouchee, did not appear in person; the first consideration, therefore, was, whether the appearance of *Josiah Hodgson*, her attorney, was a proper appearance or not. And, with regard to that matter, taking the facts simply as they appear on the record, the vouchee neither appeared in person nor by attorney, for the death of the vouchee, before the time when the attorney actually appeared, was a determination of the warrant of attorney. In the case of *Wynne v. Lloyd*, the error assigned was, that there was no warrant of attorney at the time of appearance, for it appeared the *teste* of the warrant of attorney was after appearance; the court in effect agreed, that an appearance, without a warrant of attorney, was error, even in the case of a person of full age, but they made the recovery good by an intendment, that the vouchee came in *gratis* before the writ of summons, and made a new warrant of attorney in due time; which shewed there must be a warrant of attorney whenever the vouchee appeared by attorney. If a tenant in tail within age is vouched in a common recovery, and appears by attorney, it may be assigned for error, for such an appearance is void. If warrants of attorney were not duly filed, it was error sufficient to reverse or arrest a judgment after verdict, before the statutes 32 *Hen.* 8. c. 30. and 18 *Eliz.* c. 14. and, since these statutes, it is still error, except after verdict;

Ante ch. 4.

Darcy,
Jackson,
Palmer 224.
Holland v.
Dantzey,
Cr. Eliz. 739.

verdict; for the statute 4 and 5 *Ann.* c. 16. which extends these statutes of jeofails to judgments by default, &c. (which is the present case) has a saving, so as there be an original writ or bill, and warrants of attorney duly filed, according to the law, as is now used. If the want of form in filing them was error, want of authority in the attorney, by reason of the determination of his warrant, was much more erroneous. Therefore, if a vouchee must appear in person, or by attorney, before judgment can be given, and, where the appearance is by attorney, if such attorney must have a proper warrant or authority to appear, and the want of such warrant is error, it is equally certain that the death of the vouchee before appearance, is a countermand or determination of the warrant of attorney; for a warrant of attorney to appear or confess judgment, is a naked authority, not coupled with any interest, and no more than an instrument, enabling the attorney to do an act which the principal himself might have done in person; and as it is absurd to say that a man can acknowledge a judgment or appear in a court of justice after he is dead, so it is as unreasonable to admit, that another person should be capable of representing him on such occasions. The personal capacity of the principal, and the derivative authority of the attorney, are founded on the same principle, namely, the life of the party, and, therefore, they must both end at his death. If a man gives a warrant of attorney to confess judgment, and dies before the judgment is confessed, the death is a countermand. If a tenant or vouchee died before judgment, and judgment had afterwards been entered, it would be erroneous. Thus, where a writ

1 Inst. 52 b.

1 Vent. 310.
Salk. 87.

Jourden v.
Denny,
2 Bulst. 241.

of error was brought to reverse a judgment in *C. B.* the error assigned was, that judgment was given against a dead person, the defendant dying after the day of *Nisi Prius*, and before the day in bank : and the court were all of opinion, that the judgment being given against a defendant who was dead, it was erroneous, and must be reversed. That case was before the statute 17 Car. 2. c. 8. which provides a remedy where either party dies after a verdict, and before judgment, and gives a power to enter up judgment within two terms after the verdict. The case was the same at common law before the statute 17 Car. 2. c. 8. But by the statute 8 and 9 Wil. 3. c. 11. s. 6. it is provided, that if a plaintiff or defendant dies after an interlocutory, and before a final judgment, the action shall not abate, but the plaintiff may, notwithstanding, proceed to a final judgment. These statutes shew what the common law was, and how a judgment against a dead person was to be considered. If a tenant in a real action dies pending the writ, and judgment is afterwards given, it is error, because given against a dead person. Thus the common law stands with regard to plaintiffs or defendants dying before judgment, in real and personal actions ; and there is no act of parliament which alters the common law in this case. The present action is a real action ; it is a writ of entry upon a disseisin, and *Alithea Apperley* the vouchee, after appearance, and entering into the warranty (admitting that to be the case) was the tenant in law, and her death before judgment, was the same as if any other tenant had died, in case an action had been only between demandant and tenant, without any vouchee. Every vouchee may
take

2 Roll. Ab.
768.

take advantage of any error between the other parties : the second vouchee may assign error between the tenant and the first vouchee. The reason is, because the judgments are several and distinct, for in every common recovery there are several judgments, and several recoveries are included, and it ought to appear, that all of them are regular and against proper parties, and that all the parties are before the court. *Littleton* S. 491. says, if in a *præcipe quod reddat* the tenant vouches, and the vouchee enters into a warranty, if, afterwards, the demandant releases to the vouchee, it is good ; for the vouchee, after he hath entered into the warranty, is tenant in law to the demandant. So, in *1 Inst.* 265 *b.* it is said, that when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him in respect of the privity between them. These authorities shew, that the same regularity, even in process, is required to bring in the vouchee upon a voucher, as is requisite to bring in the tenant at first ; and that the vouchee, after he hath agreed and entered into the warranty, is considered in this action as actual tenant of the freehold : and it has been shewn, that if the tenant dies before judgment, it is error, and the law is the same if the vouchee dies before judgment. It follows, that as the verdict finds the vouchee died upon the 10th of *May*, which by the record appears to be prior in time to any appearance of the vouchee, (for that was not until the 16th of *May*), and no judgment was or could be given till after appearance, that, therefore, it is an erroneous judgment, being given after the death of the vouchee. *Pigot* 196.

With respect to the second point, two objections were made by the counsel for the defendant ; first, that the assignment of error, and finding the special verdict, was against the record ; and, secondly, that the judgment had relation back to the first day of the term, on which day the vouchee was alive. The argument respecting the first of these objections, will be stated in the last chapter of this work.

As to the second objection, it was true, that the term to many purposes was considered as but one day, and that a judgment given the last day of the term, related back to the first day : but this rule was only applicable to cases between plaintiffs and defendants, where there was no continuance entered from one day to another in the same term, no fraction of the term by any thing appearing on the record, nor no injury to any third person ; as it is one entire transaction on the record of that term, it is all considered as done on the first day of the term. But this judgment differs materially from the ordinary course of judgments, to which the rule of relation is generally applied : the record shews, that the term cannot, on this occasion, be considered as one day, for the continuance from one day to another shews, that different facts were done on different days, in the same term. On these days of continuance the parties might have shewn any matter to the court ; they might have shewn on the morrow of the Ascension, that *Alithea* was dead, that she died on the 10th of *May*, and then the recovery would not have passed. These continuances, therefore, take away all presumption and possibility, that the judgment was
given

given on the first day of the term, for such a presumption would be directly contrary to the record; and it would be an extraordinary doctrine to say, that no averment shall be admitted against a record, and yet that the court shall be at liberty to presume a matter against a record, viz. when the record says a *placitum* was pending on the 16th day of *May*, that the court should presume the judgment was given long before that period. The relation or fiction of law, in the ordinary course of judgments, is not against the record; and that is the reason why the court should not consider this judgment as given the first day of term, *stabitur præsumptio donec probetur in contrarium*; and here is the highest evidence to the contrary, the record itself. In *Shelley's* case, the recovery was held to be good, because he was alive on the day on which judgment was given, though he died before the court sat, because the court would not allow a fraction of a day; but if he had died the day after judgment was given, it would have been void; for, although the court would not allow a fraction of a day, yet it would allow a fraction of a term. All the court did in *Shelley's* case, was extending the relation to the first instant of the day, in support of a judgment given on that day. A judgment shall have relation to the first day of the term, as if it was given on that very day, unless there is a memorandum to the contrary on the record, as where there is a continuance of the cause until another day in the same term, and the present cause was continued until another day in the same term. In all cases of judgments by default, they do not relate back to the *essoin* day, which is the first day of term, but to the

the *quarto die post* ; for the court takes notice judicially, that the party was not demandable before that day, and consequently, could not till then be guilty of a default ; he might have appeared the first day of term, if he pleased, and then the judgment would have been given on the first day of term. So here the vouchee might have come in *gratis* before the morrow of the Ascension, but she did not ; there was no appearance until that time, and, as the judgment could not have been given until that day, it cannot relate back to a prior day, so as to prejudice a third person. These reasons and cases shew, that judgments do not universally, and in all cases, relate to the first day of term, and, particularly, that the judgment in the present case cannot have such a relation, because the record shews it is impossible that it should.

This case was several times solemnly argued at the bar of the King's Bench, and Lord Chief Justice Lee for himself and the other Judges gave judgment. And in summing up the arguments, he reduced them to these three principal points. 1st, That it was insisted on for the defendant in error, that a recovery was a common assurance, and as the vouchee had done all he could (if he had lived) to perfect it, the court would give it an equitable construction, and not suffer it to be reversed for so small a fault, if it should be deemed one. 2dly, That the recovery should be deemed perfect from the first day of the term wherein it was passed, and then the vouchee was alive. And though the judgment was actually given after his death, yet that should have relation to the first day of term, as in the case of
many

many other judgments. 3dly, That as the vouchee appeared by attorney at the return of the summons, and that appearance was entered on record, this was an error in fact against the record, which would not be allowed.

To these three objections to the writ of error, the court gave these answers; that as to the first, the recovery being a common assurance, ought and should be supported as far as the law would allow of; but that they could give it no equitable constructions, which create absurdities, as it would apparently be, if they should suffer judgment to be entered against a dead person.

To the second, that it was very true in many cases, where judgments were entered in the vacation, they should have relation to the first day of the preceding term, but that was never the case where continuances were entered on record: for, whenever there are continuances entered from time to time, (as in the case of a recovery), and judgment is afterwards given, that judgment can have relation no farther backwards than to the time of the last continuance or rest; and, here, the time of the last continuance or rest was the return of the writ of summons; for then the demandant imparles, and judgment was not, nor could not be given, till he came again.

To the third, that the death of the vouchee was a collateral matter, not contrary to the record, and, therefore,

therefore, the plaintiff was not estopped from assigning it for error.—The recovery was therefore reversed.

Sheepshanks
v. Lucas,
1 Burr. 410.

§ 14. In another case, where a writ of error was brought from the Court of Common Pleas, to reverse a common recovery, and the error assigned was, the death of the vouchee before judgment. The defendants pleaded *in nullo est erratum*, which confesses the error assigned to be true. Lord Mansfield said it was plain, that judgment could not be given against a man after he was dead. That there could have been no judgment against the tenant to the *præcipe* in a common recovery, without a judgment over in value against the vouchee; they were all entered at the same time, and were part of the same proceeding. The recovery was unanimously reversed; and it was said, that the case of *Wynne and Wynne* was an authority in point.

Judgment
cannot be
given on a
Sunday.

§ 15. If a writ of *summoneas ad warrantizandum* be returnable on a *Sunday*, and the vouchee dies on that day, the recovery is void, because *Sunday* being a *dies non juridicus*, judgment could not possibly have been given until the *Monday* following, consequently, the judgment must have been given after the death of vouchee.

Swann v.
Broome,
3 Burr. 1595.
1 Black. Rep.
496. 526.

§ 16. Thus, where a writ of error was brought in the Court of King's Bench from the Court of Common Pleas, to reverse a common recovery, and the error assigned by consent was, "that the day of the return
" of the writ of summons was on *Sunday* the 13th of
" *May* 1750, on which said 13th of *May*, *Edward*

“ *Swann* the vouchee in the common recovery died.”
Two questions arose on this case. 1st, Whether the judgment could relate to the effoin-day of the term, or to any day prior to the 13th of *May*, the effoin-day of the return. 2dly, Whether, by law, a valid judgment could possibly be given on the day of the return, being *Sunday*?

Lord *Mansfield* delivered the resolution of the court, that the recovery was bad, because no judgment could, in this case, be supposed to be given before the death of the vouchee. That this judgment could not relate to the first day of the term, because it could not be given before the return of the writ of summons, which appears, by the record, to be in the term. That it could relate only to the effoin-day of the writ of summons, which was upon *Sunday*; and as the courts do not sit on a *Sunday*, judgment could not possibly have been given until the *Monday*, when the vouchee was dead.

To reverse this judgment, a writ of error was brought in the House of Lords, and, on behalf of the plaintiff, it was insisted, that *Edward Swann* the younger, being alive on the day he was called to appear, and having appeared by his attorney, on the return-day of the writ of summons to warranty, to which day the judgment in the Common Pleas must necessarily relate; must be alive when the judgment was given against him, and therefore the recovery was good. That this position follows from the reasons and authorities of legal relations of judgment, *viz.* that the term be considered in
law

6 Brown,
Parl. Ca.
333.

law as one day, judgments in general relate to, or, in law, are supposed to be given, and receive a construction, as if they had been given on the first day of the term, and that is the effoin-day. But, in particular cases, where the term, by the proceedings in it, suffers a division, as in the present case by the summons to warranty, the judgment relates to the effoin-day of that return; on which day, it was admitted by the record, that *Edward Swann* the younger, was alive. It is, however, objected, 1st, That the effoin-day was *Sunday*, on which day the court never sits, and so cannot be supposed to have given judgment on that day. 2d, That the court never did sit on a *Sunday*, nor could it sit on that day, because forbid by several canons which were adopted by the common law. To the first objection, it was answered, that courts formerly commenced all law business on the effoin-days, which were *Sundays* or festivals, and so might pronounce judgment on those days. The authorities in the books are many and uniform, that the judgments given in term-time all bear relation to that day, whether a festival or not; and the reason is the same where the process is returnable in the middle of the term, before the relation to the effoin-day of that return. That the entry, in the present case, which says, *at which day comes here as well the said Thomas in his proper person, as the said George by John Glasse his attorney; and the said Edward being summoned, &c. likewise comes, &c. and afterwards departs in contempt of the court*, was also an estoppel to say, that the judgment was not given on that day, or that it was given on any day before, or even after that day. As to the other objection, it was said,

said, that the very canons prohibiting, were evidence of the fact of sitting on a *Sunday*; and it was further proved by the returns of the writs, all which were formerly on festivals; and in the year 1763, nine returns out of seventeen were on a *Sunday*, as appears by the almanack of that year. That it would be strange for the king, by his writ, to order the parties to appear on a day on which no court was or could be held, if they were not to sit on that day. Besides, the many cases of testing and returns of writ, adjourning terms, casting or warranting effoins, &c. all which were equally objects of the canon law, prove the fact of courts actually sitting on *Sundays*. As to the canons, they could only have the same force as in other cases, when adopted, *viz.* to subject to spiritual censures, but not to invalidate the act; like to the canons against holding fairs on a *Sunday*, which was also prohibited by statute, under temporal penalties; but the contract was binding, till at last, by another statute, the contract was made invalid. But as no act extended in words to the present subject, therefore, it was not against the common law for the court to sit and pronounce judgment on that day; or by construction or intendment of law, the judgment, as given in this case, as the entry imported, the court must intend that it was given on that day. If the canon law had been adopted, *i. e.* incorporated into our law, and if, in after times, the Legislature had thought it necessary to forbid judgments having relation to the effoin-days, they would then have changed the return of the writs; for it is now necessary to take out the writs returnable on the general return-days, and the greatest part of these are *Sundays*;

and as they must be considered as common days of return, and as the judgments necessarily relate to these days and no other, if *Sundays* are to be for this purpose taken as *dies non juridici*, then most of the judgments given in term must necessarily be bad, as bearing relation to that illegal day ; and thus the return-days would remain as so many snares for error. But it may be presumed, the Legislature did not thus consider it ; and thought the returns and relations of law might still remain, though they knew that the courts, in decency, only sat on *Mondays*, and that the legal relation to *Sunday* of the judgment given on *Monday*, could be no violation of the *Sabbath*, and would still preserve private rights. For the profanation of the *Sabbath* was the only object of the Legislature ; but it never intended to interfere with private rights.

On the other side, it was said, that a common recovery, though now become a usual mode of conveyance, must necessarily be attended with all the ceremonies and solemnities of an actual suit at law ; and if those are wanting, the conveyance by recovery is as defective, as a will devising lands, to which there are only two subscribing witnesses. That as the recovery pursues the forms of a real action, it is of absolute necessity that the vouchee, against whom the judgment is obtained, should be living on the day when such judgment is given by the court, for, otherwise, such judgment is erroneous. That though, in all cases, the judgment shall relate as far back as can be permitted by the facts appearing on the record, yet no fictitious relation shall presume what is in itself impossible. In the

the present case, the writ of summons being returnable on *Sunday* the 13th of *May*, the judgment in the recovery was not, nor could be given till *Monday* the 14th of *May*; for though many nominal return-days of writs were very anciently fixed upon *Sundays*, yet both by law and practice, courts of justice cannot now sit upon a *Sunday*, but the business appointed for that day is, and always must be, dispatched upon the *Monday* immediately following. As, therefore, the vouchee died upon *Sunday* the 13th, the day preceding the judgment, the judgment was given against a person not *in esse*, and, consequently, was totally erroneous. That it was not sufficient to say the vouchee had done every act necessary to be done by him, that he had executed the deed to make a tenant to the *præcipe*, had acknowledged the warrant of attorney, and had thereby completed, in substance, every thing requisite to this particular mode of conveyance; for no warrant would empower an attorney to appear in the name of another, after the death of his principal. The vouchee, it was acknowledged, intended to perfect this conveyance, but died before he could accomplish it; and whether he died a day or a month too early, was quite immaterial. Every act done by him, might have been done in the month of *September*, previous to a recovery intended to be suffered in *Michaelmas* term; and yet it would not be contended, that if such a vouchee had died in *October*, the recovery could have been perfected in the subsequent term. It was therefore hoped, that the judgment of the Court of King's Bench, reversing the judgment in the recovery, would be affirmed.

After hearing counsel on this writ of error, the Judges were directed to deliver their opinions upon the following question, *viz.*—“ Whether the recovery is “ good, or erroneous, the return-day of the writ of “ summons being on *Sunday* the 13th of *May*, on “ which day *Edward Swann* the younger died ?” And the Lord Chief Baron of the Court of Exchequer having conferred with the rest of the Judges present, acquainted the House, “ that they all agreed in “ their opinion, that the recovery was erroneous.” Whereupon, it was ordered and adjudged, that the judgment of the Court of King’s Bench should be affirmed.

TITLE XXXVI.

RECOVERY.

CHAP. VI.

Of Execution.

- § 1. *Nature of.* 11. *All the Proceedings in Recoveries may be inrolled.*
 6. *May be sued against the Heir.* 13. *Statute 14 Geo. 2. c. 20. s. 4.*
 9. *Must appear upon Record.*

Section 1.

AFTER the demandant has obtained judgment in a common recovery against the tenant, and the tenant against the vouchee, &c. the court awards a writ of *habere facias seisinam*, in the same manner as upon a judgment in an adversary action, to the sheriff of the county in which the lands lie, directing him to put the recoveror in possession of the lands which he has recovered; and when this writ is returned, the recovery is complete and executed.

Nature of.
 1 Inst. 361 b.

§ 2. The writ of seisin should bear teste the fourth day inclusive after the return of the writ of entry, or last writ of summons, when the vouchee comes in by summons; and there should be fifteen days between the teste and the return of the writ of seisin.

Wilson 319.

§ 3. A judgment in a common recovery, which is not regularly executed by the return of the writ of seisin,

Sir W. Jones
 10.
 1 Will. R. 55.
 2 Stra. 1185.

seisin, has no manner of operation; nor does it alter the nature of the estate. And as almost all recoveries are now suffered to uses, no seisin is in the recoverors, and of consequence no use is raised until the execution of the recovery; for until then the land does not pass.

1 Roll. Ab.
886.

1 Rep. 97 b.

§ 4. If a recovery be suffered of a rent, common, &c. it is sufficient that the sheriff deliver seisin upon the land, of the rent, common, &c. by parol, for the demandant will thereby acquire the actual possession.

1 Rep. 94 b.
Id.—106. b.

§ 5. If a common recovery be suffered of lands which are let on leases for years, the recoverors have not the reversion presently by the judgment, but it must be executed by writ, entry, or claim.

May be sued
against the
Heir.

§ 6. If a person suffers a common recovery, and dies before it is executed, the recoveror may sue execution against his heirs.

1 Rep. 93.

§ 7. Thus in *Shelley's* case it was unanimously resolved, that although *Edward Shelley* died on the very day on which the recovery passed, and consequently before the writ of *habere facias seisinam* could be awarded, yet that execution might be sued against his heirs.

1 Inst. 104 b.

§ 8. By the statute 7 Hen. 8. c. 4. all recoverors in common recoveries are allowed the same remedies against lessees for lives and years, by distress, avowry, and action of debt, for rents and services which be-
come

come due after the recovery, as the persons against whom the recovery was had were intitled to.

§ 9. The awarding of a writ of seisin, its execution and return by the sheriff must appear upon record; and if a writ of execution be not found in a special verdict, it cannot be presumed by the court.

Must appear
upon Record.

§ 10. Thus in ejectment the jury found a special verdict, that *Henry* the 7th granted the manor of *Witherlack* to *Thomas* Earl of *Derby*, to hold to him and the heirs male of his body; that *Thomas* Earl of *Derby*, grandson to the said *Thomas*, suffered a recovery of the said manor, and afterwards entered into the said manor, and was seised thereof; but no writ of execution or entry of the recoverors appeared upon the special verdict in which this recovery was found; and the Court of King's Bench was of opinion, that as execution was not found, it could not be presumed, and therefore that the recovery was not good. A writ of error was brought in the House of Lords; and it was argued, that this judgment was erroneous, and that a writ of execution, though not expressly found, ought to have been presumed, for the following reasons: First, from the exemplification of the recovery itself, as found; its antiquity of above 230 years; its being entered upon the rolls; the dignity and quality of the parties to it; and a fresh entry of Earl *Thomas*, expressly found to have been made after such recovery. Secondly, from the impossibility of any other proof of actual execution, as it was well known, that amongst the rolls of the recoveries of that and the preceding reigns, the award of the writ of

Witham v.
Lewis,
1 Will. Rep.
48.
6 Brown Parl.
Ca. 327.

execution is not entered or indorsed upon one in twenty of them, as has been usual of late years ; and upon search in the proper offices where the writs of execution of recoveries suffered in those early times ought to be filed, not one of such ancient writs is to be met with. Thirdly, because, had any objection been made at the time of the trial of the recovery, on this account, the court would, and ought to have directed the jury to find the execution of it, from the exemplification itself, and the possession of the defendant and his ancestors, agreeable to it.—And if so, it is difficult to give a reason why the courts of law should not draw the same legal conclusions, and make the like legal implication from facts themselves, which they would direct a jury upon their oaths to do. Fourthly, from the fatal consequences which might attend this judgment ; for if this doctrine should be established, that the judges ought not to presume execution at this distance of time, it might shake the titles of great part of the property of this kingdom, which probably may depend on the validity of ancient recoveries, suffered before the statute 34 *Hen. 8.* for if a jury should think proper to insist upon evidence to support such ancient recoveries, which, for the reasons above, appears impossible to be laid before them, as no attainr or other remedy against them would lie in such case, all property might be subjected to an arbitrary and perhaps corrupt determination of a jury, without any redress whatever. On the other side it was contended, that the judgment of the King's Bench should be affirmed, because it did not appear that any writ of seisin was ever awarded upon the common recovery suffered by Earl *Thomas*, or that the

same was ever carried into execution by writ of seisin, or otherwise; for, until a writ of seisin is awarded, executed and returned, (all which must appear upon record, and cannot be presumed) it is not a perfect recovery, and operates nothing; and no new estate is gained to the recoveror, nor any use raised thereby; nor is the former estate altered or changed. And it was so determined upon a question on this very recovery, so long ago as in the reign of King *James I.*—And, as in the present case, no new estate was gained to the recoveror, no new use raised, nor the old estate changed or altered by this recovery, Earl *Thomas* still continued tenant in tail. After hearing counsel in this cause, the following questions were proposed by the House to the Judges;

Sir W. Jones
D.

First, Whether sufficient matter was found in the special verdict, whereupon the common recovery of 5 Hen. 8. can be adjudged or taken to be a complete valid recovery?—And, secondly, if not, whether, by law, a *venire facias de novo* ought to be awarded in this case? The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the Judges, that there was not sufficient matter found in the said special verdict, and that a *venire facias de novo* ought to be awarded. Whereupon the judgment of the King's Bench was affirmed.*

* In a modern case Lord *Kenyon* says of this determination :—
 “ Lord *Derby's* case has always been considered as a strange case ;
 “ and the Judges of succeeding times have been astonished that no
 “ application was made to the Court of Common Pleas to rectify
 “ the defect in that recovery according to the usual practice of
 “ the court.” 5 Term. Rep. 179.

All the Proceedings in Recoveries may be inrolled.

§ 11. By the statute 23 *Eliz.* c. 3. § 1. it is enacted, that every original writ of entry in the *post*, or other writ whereupon any common recovery shall be suffered, the writs of *summoneas ad warrantizandum*, the returns of the said originals and writs of *summoneas ad warrantizandum*, and every warrant of attorney, as well of every demandant and tenant, as vouchee, extant and in being, may, upon the request or election of any person, be inrolled in rolls of parchment; and that the inrollments of the same, or of any part thereof, shall be of as good force and validity in law, to all intents and purposes, for so much of any of them so inrolled, as the same being extant and remaining, were or ought by law to be.

§ 12. And by the second section of this statute it is further enacted, that no common recovery shall be reversed or reverfable for false or incongruous Latin, rasure, interlining, mis-entering of any warrant of attorney, mis-returning, or not returning of the sheriff, or other want of form in words, and not in matter or substance.

Stat. 14 Geo.
2. c. 20. § 4.

§ 13. There are many exemplifications of recoveries suffered between the commencement of the reign of Queen *Anne*, and that of *Geo.* 2. whereof no entries upon the rolls in the Treasury of the Common Pleas, nor any writ of entry, summons, or seisin can be found.

Mr. *Pigot* having, in the course of his practice, discovered repeated instances of this neglect, procured the

the following statute to be passed, in order to prevent the inconveniencies which might arise to purchasers from an omission of this kind.

§ 14. 14 Geo. 2. c. 20. f. 4. “Whereas by the default or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights: for remedy thereof, be it further enacted by the authority aforesaid, that where any person or persons hath, or have purchased, or shall purchase, for a valuable consideration, any estate or estates, in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate, or estates, from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds, making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or common recoveries, and declaring the uses of a recovery or recoveries, and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according
“ to

“ to the purport of such deed or deeds, in case no
“ record can be found of such recovery or recoveries,
“ or the same shall appear not to be regularly entered
“ on record : Provided always, that the person or
“ persons making such deed or deeds as aforesaid,
“ and declaring the uses of a common recovery, or
“ recoveries, had a sufficient estate and power to
“ make a tenant to such writ or writs as aforesaid,
“ and to suffer such common recovery or recoveries.”

TITLE XXXVI.

RECOVERY.

CHAP. VII.

In what Courts and of what Things a Recovery may be suffered.

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|---|---|
| § 1. Court of Common Pleas. | 6. Of what Things a Recovery may be suffered. |
| 2. Court of Great Sessions in Wales, | 8. Tithes. |
| 3. Court of Chester. | 9. Advowsons. |
| 4. Courts of the Counties Palatine of Lancaster and Durham. | 12. Rents, &c. |
| 5. Court of Hustings in London. | 13. But not of a Fishery, &c. |
| | 14. By what Descriptions. |

Section 1.

A Common recovery can in general only be suffered in the Court of Common Pleas at *Westminster*, because a real action cannot be commenced in any other court,

Court of
Common
Pleas.

§ 2. By the statute 34 & 35 *Hen. 8. c. 36. f. 40.* it is enacted, that common recoveries may be suffered at the courts of great sessions in *Wales*, in like manner and form as in the Court of Common Pleas in *England*.

Courts of
Great Sessions
in Wales.

§ 3. *Chester* having been a county palatine since the Conquest, has always had courts of its own for the cognizance

Courts of
Chester.

cognizance of pleas in all real actions, and consequently recoveries have been suffered in those courts. And by the stat. 34 & 35 *Hen.* 8. c. 26. f. 6. the Justice of *Chester* is authorized to hold sessions, twice a year, in the shires of *Denbigh*, *Flint*, and *Montgomery*; and by f. 42. of this statute it is enacted, that every person suing writs of entry in the *post* for any recovery, shall pay such fines for the same, as is used in the King's Chancery. And by the stat. 43 *Eliz.* c. 15. f. 4 & 5. it is recited, that the Mayor of the city of *Chester* had been time out of mind accustomed, in all common recoveries suffered before him, to award writs of *dedimus potestatem* to receive warrants of attornies from the tenants or vouchees in such recoveries.

Courts of the
Counties Pala-
tine of Lan-
caster and
Durham.

§ 4. Common recoveries may also be suffered of lands lying in the counties palatine of *Lancaster* and *Durham*, in the respective courts of those counties.

Court of
Hustings in
London.
Bohun's Priv.
Lond. 241.
2 Rep. 57 b.

§ 5. By the custom of *London*, common recoveries may be suffered upon writs of right, of lands lying within the precincts of the city of *London*, in the court of Hustings.

Of what
Things a Re-
covery may be
suffered.

§ 6. A common recovery may be suffered of all things whereof a writ of covenant may be brought for the purpose of levying a fine, as of an honor, barony, castle, messuage, curtilage, land, meadow, pasture, underwood, warren, furze, heath, moor, &c. And in general a common recovery may be suf-
ferred

ferred of any thing whereof a writ of entry *sur disseisin*, or any other writ of entry will lie.

§ 7. A common recovery may be suffered of an undivided part, as well as of the whole. And where a person seised of a third part of a manor suffered a recovery of a moiety of the manor, it was held good for a third part. Cro. Car. 110.

§ 8. In consequence of the statute 32 Hen. 8. c. 7. f. 7. a common recovery may now be suffered of every kind of ecclesiastical or spiritual profits, as of tithes, oblations, portions, pensions, &c. Tithes, &c.
Tit. 35. c. 6.
f. 7.

§ 9. It was determined in *Dormer's case*, that a common recovery might be suffered of an advowson in gross, upon a writ of entry. Mr. *Pigott* says, that this must be understood of an advowson appendant to a manor, but could not be of an advowson in gross, since the parson has the freehold, and that therefore it ought not to be by writ of entry *en le post*, but by writ of right of advowson. Advowsons.
2 Mod. 49.

§ 10. A common recovery may, however, be suffered of an advowson in gross, and a small quantity of land on a writ of entry *sur disseisin*.

§ 11. Thus, where the validity of a common recovery, which had been suffered of an advowson in gross, and one acre of land, upon a writ of entry *sur disseisin*, was questioned as to the advowson: upon searching for precedents, sixteen were found, where recoveries Bayley v. The
University of
Oxford.
2 Will. 116.

recoveries of advowsons in gross, and a little land, had been suffered upon writs of entry *sur disseisin*; and no case was found where such a recovery was ever held bad. The court refused to hear any argument against the recovery, but said, that if this was *res integra*, perhaps it might not be right, yet *quod fieri non debuit factum valet*; and gave judgment that the recovery was good.

Rents, &c.
Pigot 97.
Vide Turner
v. Turner,
Brown's Rep.
316.

§ 12. A common recovery may be suffered of a rent-charge issuing out of lands; but not of an annuity which is only charged on personal estate.

But not of a
Fishery, &c.
Pigot 96.

§ 13. It is said in *Pigot*, that a common recovery cannot be suffered of a fishery, common of pasture, estovers, services to be done, nor of a quarry, a mine, or market, for they are not in demesne, but profit only.

By what
Descriptions.

§ 14. With respect to the descriptions which are necessary to be used of those things whereof a recovery is suffered, they should be the same as in a *præcipe quod reddat* in an adversary suit, but as recoveries have long been considered as common assurances and conveyances by consent, great indulgence has been given them by the Judges.

Thinne v.
Thinne,
1 Lev. 27.

§ 15. Thus, where a person was seised of a reputed manor only, and suffered a common recovery of it by the description of the manor of *A.* it was held good, and in this case it was said that where there was an indenture to suffer a recovery of a manor and all lands, reputed

reputed parcel thereof; and a recovery was suffered of the manor, the lands reputed parcel would pass, because it appeared by the verdict that it was the intent of the parties that they should pass: and because the constant practice and received opinion since Sir *Moyle Finch's* case had been that lands reputed parcel should pass.

§ 16. A person being seised in tail, among other lands of two marshes, called *Knightswick* and *Southwick*, lying in an island called *Camby*, in the parish of *Northfleet*, suffered a recovery, in which *South Benfleet*, and many other parishes were named, and also *Camby*, but the parish of *North Benfleet* was omitted. And the question was, whether the lands in *North Benfleet* passed or not. The court agreed, that the town and parish being omitted, though *Camby* was a *lieu connu*, yet being in a town, the recovery did not extend to it. That a recovery in a town, parish, or hamlet, is good, and perhaps in a place known out of a town, parish, or hamlet, but to admit a recovery of lands in a place known in a town, would be absurd, for there is no town in which there are not twenty places known.

Baker v. Johnson,
Hut. 106.

This case was denied to be law by Lord Chief Justice *North*, who said that it had been long disputed whether a fine of lands in *lieu connu* was good, but that in the time of King *James I.* the law was settled in that point that it was good, and for the same reason a recovery would be good, for they were both amicable suits, and common assurances, and as they grew
more

2 Mod. 49.

more in practice, the Judges have extended them farther.

Lever v.
Hofier,
2 Mod. 47.
S. C. by the
name of *Jones*
v. Wait,
1 Mod. 206.

§ 17. *Sir Samuel Jones* being tenant in tail of lands in *Shrewsbury* and *Cotton*, which were within the liberties of *Shrewsbury*, suffered a common recovery of all his lands lying within the liberties of *Shrewsbury*; and the question was, whether the lands in *Cotton*, which was a distinct vill, though within the liberties should pass. It was adjudged, that as the jury had found *Cotton* to be a vill within the liberties of *Shrewsbury*, the lands in *Cotton* should pass by the recovery.

Addison v.
Otway,
1 Mod. 250.
2 Vent. 31.
Freem. 241.

§ 18. In ejectment a special verdict was found, that there was a parish of *Rippon*, and a vill of *Rippon*, but the latter was not co-extensive with the former: that a person who was tenant in tail of lands in the parish, but out of the vill, bargained and sold all his lands lying in the parish of *Rippon*, with a covenant to levy a fine and suffer a recovery to the uses of the deed: that a common recovery was accordingly suffered of one hundred acres of land lying in *Rippon*: that the tenant in tail had no lands in the vill of *Rippon*, and that the intention of the parties was, that all the lands in the parish of *Rippon* should pass. It was argued, that the common law knows no such division of the kingdom as parishes, but only the division of vills, and therefore where a place is named in a record, and no more said, it is always intended a vill; consequently, that the recovery, if it passed any lands at all, could only pass those in the vill. But the Court

were of opinion, that the recovery should extend to the lands in the parish of *Rippon*, 1st, Because otherwise the recovery would be void, it being found that the tenant in tail had no lands in the vill of *Rippon*. 2dly, Because it plainly appeared to be the intention of the parties that this should be intended the parish of *Rippon* (not because the jury had found it, for the Judges said, they would pay no attention to that), but because it appeared by the bargain and sale to be the intention of the parties, that the recovery should extend to all the lands in the parish of *Rippon*, and not be confined to the lands in the vill of *Rippon*; for the bargain and sale and recovery, were to be considered as one assurance. And although a place spoken of simply is in law intended a vill, and *stabitur presumptio donec probetur in contrarium*, yet here was sufficient proof of the intention of the parties.

§ 19. In a writ of error from a judgment on *scire facias* in the Court of King's Bench in *Ireland*, brought to reverse four common recoveries in the Court of Common Pleas there, two of lands in the county of *Limerick*, and two of lands in the city of *Limerick*. Mr. Buller for the plaintiff in error objected, that the several descriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections to them were, 1st, As to the premises in the county, because some were demanded, thus, "all those the castle, town, and lands of, &c." "containing by estimation so many acres," without setting out the quality of the lands; that a recovery could not be suffered of a town, and that so many

Massey v.
Rice,
Cowper 345.

acres by estimation was uncertain. 2d, That others were described thus, "all that part of the town and lands, &c. now or late in the tenure of A. B." which was vague and uncertain. 3d, That two parcels were described as "containing a plough land," which was also vague and uncertain. In respect of the premises in the city he objected, that they were all demanded by the description of "messuage or tenement," which was uncertain, and also as being said to be "now or late in the tenure, &c." he insisted that a recovery has no effect until execution, therefore the description of the premises should be so certain that the sheriff may know how to execute it, and if bad in ejectment, *a fortiori* in a *præcipe*. Mr. *Alleyne* for the defendant in error, said, he should consider, 1st, What degree of precision was required by the register to the description of lands demanded in a *præcipe quod reddat*. 2dly, What indulgence was to be given to a common recovery, as a conveyance and common assurance. 3dly, Whether from the locality of these particular lands the descriptions were not sufficient. 1st, It was a general rule, that the form of the register must be followed; but there were cases that admitted of a deviation from it. The general principle upon which all forms were founded, and upheld, was, that the defendant might know what he was to defend; and therefore whenever the term used, either in respect of the quantity or the quality, was sufficiently certain and notorious to answer that purpose, it would be good, though not particularly named in the register. 2dly, Great favour was to be shewn to common recoveries, because they were now a species of conveyance and common

common assurance of land. They were not like the cases cited, most of which were cases in *ejectment*, which are adversary suits, and where the objections arose in consequence of some essential defect which was fatal. But a common recovery was in the nature of an amicable suit, which admitted of a greater latitude and any description that would be good in a deed, would be good in a common recovery. 3dly, With regard to the local situation of lands in *Ireland*, it had always been understood that the Judges of *Ireland* knew the description of lands in that country better than the Judges here, and therefore credit ought to be given to their knowledge. It was expressly held in 2 *Roll. Rep.* 166. 1 *Stra.* 71. & 1 *Burr.* 623. which last case in principle answered all the objections that had been made. Another argument arose upon the statutes of Jeofails, which was, that, being after verdict, they were now too late. As to the objections made to the particular descriptions of these lands, 1st, The word "town" in *Ireland* did not mean, as it does here, houses inhabited, but was merely a technical description of a particular district, and is notorious there. 2dly, With respect to the uncertainty of "so many acres by estimation," it was sufficient if the general boundary was known, it was not necessary that the precise measure should be accurately and exactly ascertained: and as to the term "land" in legal acceptance, it always meant arable. 3dly, The term messuage or tenement does not stand alone, but is accompanied with other words descriptive of its situation, which render it sufficiently certain for the sheriff to deliver possession, besides it was the same

5 Rep. 40.
Poph. 22.

2 Mod. 233.

description that was used in the deed of settlement, by which the estate was intailed; therefore, even if the descriptions were more doubtful, the court would make such a construction as would support them.

Lord *Mansfield*.—The consequences of those objections are so great; they are so void of the least glimmering of reason and common sense; and it would be attended with such vast inconveniencies to the public in many cases, without a possibility of doing good in any, if in common recoveries, which are a species of conveyance and common assurance, such nice exceptions were to prevail; that the strictest proof of their being founded in law is necessary, to induce the court to overturn a recovery on such grounds. By the settled law of the land, men by deeds may fetter their estates; but tenant in tail when of age may unfetter them, observing a certain form. In this case there can be no doubt of the meaning of the tenant in tail, or his power, to unfetter the estate. The only question is, whether he has done it agreeable to the proper form; that is, whether he has described the premises with sufficient certainty. Now the description which he has used, is the identical description in the deed which created the fettering; and the objection which is made, is not so much that that description is uncertain; as that six or seven hundred years ago, in an adverse action, there was a doubt whether such an objection would not have lain: and therefore the defendant would make the same objection and raise the same doubt now. But a common recovery is not an adverse action. It is said that “all that messuage or
“ tenement

“ tenement with the appurtenances, situate in the
 “ lane between the two abbey gates, now or late in
 “ occupation of J. C. his under-tenants or assigns in
 “ the county of the city of *Limerick*,” is too vague
 and uncertain. But one must look with a microscopic
 eye to discover, that a messuage or tenement, &c. is
 so uncertain a description, as that the sheriff, or any
 other person, could not know how to find the pre-
 mises by it; and the objection can only be made by a
 person who pores over the syllables of the words.

The objections are of two sorts, and I have no
 doubt as to either. 1st, That the premises in the
 county are demanded thus: “ all those the *castles*,
 “ *towns*, and *land*, containing by estimation, &c.”
 which it is argued is uncertain both in respect of qua-
 lity and quantity. As to that it is admitted, that,
 “ *castle*” is a good description in *England*. “ *Town*,”
 was determined to be a good description in *Cottingham*
v. King, 1 Burr. 623. and “ *land*,” means *arable*
land. The next objection is, that the premises in the
 city are described thus: “ all that messuage or tene-
 “ ment, with a garden or meadow thereto belonging,
 “ situate, &c. and now or late in the occupation of,
 “ &c.” which it has been contended would be a bad
 description in ejectment. There are many cases in
 ejectment which have gone very far indeed: And
 therefore the doctrine of those cases ought not to be
 extended. As to the authority in 3 *Wilf.* 23. which
 would have great weight on account of its being so
 recent, the judges in that case decided against their
 own private opinion and inclination, because they held

themselves bound by authority. But there, the words were only *messuage or tenement*, without any other description. Here there are other words, "with the appurtenances and a garden, &c." which shew that "messuage or tenement" are two words for the same thing; and that both mean a dwelling house. But this is not any fundamental ground of determination in the present case. What I ground my opinion upon is, the principles laid down in *Dormer's case*, 5 Co. 40 b. reported also in *Popham* 23; and the distinction the court there take, between adverse actions and common recoveries; which at that time were become a common assurance, and conveyance of lands, &c. and which the court say, "being also made by assent between the parties, shall, and always have had a different exposition from what is given to a recovery by pretence of title, or to the proceeding in any other real action to which they are not to be compared; therefore a common recovery may be suffered of an advowson, common in gross, &c. and the like, and the intent of the parties shall be observed." Now the objection in this case is an objection to the very same description as is used by the ancestor in the deed which created the entail. The sole object of the recovery is to unfetter the premises so entailed; and therefore I will not depart from this anciently established principle to do such cruel injustice, both against the intention of the parties, and against public convenience. Not one precedent has been cited where such an objection has been held good in the case of a common recovery. But a case of a fine has been cited where it was allowed, and from thence it

it has been argued by analogy, that it is bad in a common recovery; but that argument does not hold: his Lordship then cited the case of *Addison v. Otway*, and said—this decision is an instance of liberality that Ante. would not have been adopted or followed in an adverse *præcipe*. So in many other instances; as an avowson, for which no adverse action will lie, but a common recovery will; therefore as the distinction between amicable and adverse suits exists; as the inconveniencies of avoiding the recovery would be great, as no precedent in point is produced, and there is no possibility of doubt about the intent of the parties, I am clearly of opinion, that the judgment of the Court of King's Bench in *Ireland* ought to be affirmed. The other Judges concurred with his Lordship, and the judgment was affirmed.

TITLE XXXVI.

RECOVERY.

CHAP. VIII.

Of the Parties to a Recovery.

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| <p>§ 1. <i>Who may suffer a Recovery.</i>
 2. <i>Married Women.</i>
 3. <i>Aliens.</i>
 4. <i>Who are disabled from suffering Recoveries.</i>
 5. <i>The King.</i>
 6. <i>Infants.</i>
 17. <i>Idiots, Lunatics, &c.</i></p> | <p>§ 19. <i>Tenants for Life.</i>
 22. <i>Women seised of Dower or Jointures.</i>
 48. <i>Husband's seised jure uxoris.</i>
 55. <i>Ecclesiastics seised jure ecclesiæ.</i></p> |
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Section 1.

Who may
suffer a Re-
covery.

A COMMON recovery having, from its origin, been considered as a common assurance, or conveyance, by which lands were transferred from one person to another, and the default and admission of judgment by the tenant and vouchee being as much their voluntary act as if they had conveyed the land by feoffment and livery, or any other act in *pais*; it was determined, that all those whom the law enables, in other instances, to dispose of their property, and who are of full age and sufficient understanding, should have power to suffer a common recovery.

Married
Women.

2 Rep. 74.78.

10 Rep. 43.

Plowd. 504.

§ 2. A married woman may join her husband in suffering a common recovery, which will bind her as fully

fully as a fine, and for the same reason. And when, ever a husband and wife appear in the Court of Common Pleas to suffer a common recovery, the wife is always privately examined as to her consent. And where a warrant of attorney is acknowledged before commissioners appointed by writ of *dedimus potestatem de attornato faciendo* by a husband and wife, the commissioners are positively directed, by a rule of court, to examine the wife separately and apart from her husband as to her free and voluntary consent to the suffer such recovery.

Ante c. 4.
f. 12.

§ 3. An alien may suffer a common recovery, for he is a good tenant to the *præcipe* until office found.

Aliens.
4 Leon. 84.

§ 4. In enumerating the persons who are disabled from suffering a common recovery, I shall begin with those whose disability arises from the rules of the common law; and then proceed to those whose disabilities are created by particular acts of parliament.

Who are disabled from suffering Recoveries.

§ 5. The king cannot suffer a common recovery, for, if he does, he must either be tenant or vouchee; and, in both cases, the demandant must count against him, which the law does not allow.

The King.
Pigot 74.
Plowd. 244.
Cro. Car. 96.

§ 6. Infants are not capable of suffering common recoveries, on account of their want of understanding; although, if an infant is permitted to suffer a common recovery in person, he must, as in the case of a fine, and for the same reason, reverse it during his

Infants.
1 Inst. 380 A.
2 Inst. 484.
Dyer 232 A.

infancy, which must be tried by inspection of the judges; otherwise the recovery will bind him for ever afterwards.

Hopton v. Johns, Cro. Eliz. 323.
Ailet v. Walker,
2 Roll. Ab. 395.

§ 7. There are, however, two cases, in which it appears to have been determined, that a common recovery suffered by an infant who appeared in person, might be reversed. But, I presume, that these recoveries were avoided during the infancy of the vouchees; for the principle, that a recovery suffered by an infant is so far similar to a fine, that it cannot be reversed after the infant comes of age, is most clearly stated by Lord *Coke* in the places above cited, and recognized in a case subsequent to those last mentioned; in which, it was resolved, that where an infant suffered a recovery and appeared in person, a writ of error did not lie after he attained his full age; and, it is said, that the court delivered this opinion after conference with the other Judges, it being a matter of great concern.

Raby v. Robinson,
1 Sid. 321.

Ch. 4. f 9.

§ 8. But, if an infant suffers a common recovery, in which he appears by attorney, he may reverse it at any time after he attains his full age, as it may be tried by a jury, whether he was an infant or not when he appointed an attorney.

Stokes v. Oliver,
5 Mod. 209.

§ 9. Thus, where a writ of error was brought to reverse a common recovery, and the error assigned was, that one of the vouchees was a feme covert, and under age, and that she appeared by attorney. It was determined, that the recovery should be reversed, although the woman had attained her full age, because
it

it might be tried by a jury, whether the warrant of attorney was made by a person under age or not.

§ 10. It was formerly doubted, whether a common recovery bound an infant who appeared by his guardian; and the practice, therefore, was, when an infant intended to suffer a common recovery, that he and his guardian should petition the king to grant letters under the privy seal to the Judges of the Court of Common Pleas, directing them to permit such infant to suffer a common recovery. But it was still in the discretion of the Judges to permit the infant to suffer it, or not, according to the circumstances of his case; and if the Judges, upon examination, found it necessary, or that it would be advantageous to the infant that he should suffer a common recovery, they then admitted persons of known integrity and fortune to appear as guardians to the infant, and to suffer a recovery for him in court,

10 Rep. 43.
Cro. Eliz.
471.
Godb. 161.

§ 11. The Earl of *Devon* devised his estates to his son the Earl of *Newport*, who was then an infant of the age of eighteen; and among the possessions of the said Earl was the manor of *Wansted*, which he left to his son in tail, with several remainders over. The Earl of *Devon* was greatly in debt, and had appointed certain honourable persons to be guardians of his son, who found it necessary to sell the said manor of *Wansted* for payment of the Earl's debts. They therefore petitioned the king that he would write to the judges of the Common Pleas, that a common recovery should be suffered of this manor, which his majesty did. And

Blount's Case.
Hob. 196.
Jenk. Cent.
299
Sir H. Mack-
worth's Case,
1 Vc n. 461.
S. P.
Cro. Car.
397.
Helket v. Lee,
1 Mod. 48.
2 Saund. 94.

upon examination of the infant privately, and of his guardians in court, and of the circumstances of the case, a common recovery was accordingly suffered, in which the Earl of *Newport* and his guardians were vouched in person.

1 Ld. Raym.
113.

§ 12. The judges of the Court of Common Pleas may, however, refuse to permit such a recovery, if the reasons for an application of this kind do not appear to them sufficient.

Sir J. St. Alb-
an's Case,
Salk. 567.

§ 13. Sir *John S. Alban's*, being of the age of nineteen, his sister, who was next in remainder to him, and also his heir at law, married one of his footmen. He petitioned the king for leave to suffer a common recovery, who referred it to the judges of the Common Pleas, before whom several precedents of recoveries, suffered by infants upon privy seals, were cited. The judges observed, that seven of the petitions were by fathers upon the marriage of their sons, and an equal recompence given, whereas here was neither father nor marriage in the case. They said, this case had been carried too far already, and, therefore, would not allow it.

Common recoveries suffered by privy seal are now disused, and private acts of parliament are universally substituted in their stead.

Perk. 12.
3 Burr. 1804.

§ 14. If an infant is permitted to suffer a common recovery, he must make a tenant to the *præcipe* by feoffment, and give livery of seisin in person, by which means, the feoffment is only voidable; whereas, if the
infant

infant appointed an attorney to give livery of seisin for him, the feoffment would then be absolutely void.

§ 15. An infant trustee may join in a common recovery, in consequence of the statute 7 *Ann*, c. 19. if he is directed to do so by the Court of Chancery.

Tit. 35. ch. 5. f. 30.

§ 16. Thus, where a person who was a trustee, devised all his estates to his son, who was then an infant, in tail, with remainders over. A petition was preferred, that the infant to whom the trust estate was devised, might be ordered to convey by recovery, pursuant to the statute 7 *Ann*, c. 19. Lord *Hardwicke*, at first, thought there must be an application for a privy seal, but the act being general, “ that the infant “ shall convey lands, as the court, by order, shall “ direct ;” his lordship made an order, that the infant should convey by a common recovery.

Ex parte
Johnson,
3 Atk. 559.

§ 17. Idiots, lunatics, and, generally, all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines ; though, if an idiot or lunatic does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an idiot or lunatic. But if he appears by attorney, I presume such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of idiocy may be tried by a jury, with as much propriety, as the fact of infancy.

Idiots, Lunatics, &c.

Vide *infra*.

§ 18. Although

Sir B. Wentworth's Case, *infra.*

§ 18. Although no averment of idiocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted, to invalidate a deed to make a tenant to the *præcipe*, for suffering a common recovery; and the recovery has, in that manner, been set aside.

Tenants for Life.
Pigot 18.

§ 19. By the common law, if a *præcipe* had been brought against a tenant for life, and a recovery suffered, it would have barred the persons in remainder; but this being justly considered as a grievance, it was enacted by the statute 32 *Hen.* 8. c. 31. that all common recoveries suffered by tenants for life, without the consent of the persons in remainder or reversion, should be totally void.

Pigot 83.

§ 20. If, after this act, a tenant for life had made a lease for years, and the lessee had made a feoffment, and a *præcipe* had been brought against the feoffee, and he had vouched the tenant for life, such a recovery was not within the statute, because the tenant for life was not then seised of the estate for life. To remedy this, the statute 14 *Eliz.* c. 8. was passed, reciting, that several tenants in tail after possibility, and other tenants for life or lives, had suffered common recoveries, to the prejudice of those in remainder or reversion; it was therefore enacted, “ that all such recoveries had
“ or prosecuted by covin against any such particular
“ tenant, or against any other, with voucher over of
“ such particular tenant, should, as against all persons
“ in remainder or reversion, be utterly void, and of no
“ effect :

“ effect : provided that that act should not extend to
 “ recoveries by good title, or to recoveries by assent
 “ and agreement of the persons in remainder or re-
 “ version, so that such assent appeared of record in
 “ any of her majesty’s courts. And it was thereby
 “ further enacted, that the statute 32 *Hen.* 8. should
 “ be repealed.”

§ 21. In consequence of the last proviso in this statute, a tenant for life may join with the persons in remainder or reversion in suffering a common recovery, without incurring a forfeiture.

Wiseman v.
Crow,
Cro. Eliz.
 562.

§ 22. Before the statute of uses, a considerable part of the landed property of the kingdom was in the hands of feoffees to uses, by which means, women were frequently defrauded of their dower, a woman not being dowable of an use ; so that it became usual on every marriage, for the friends of the wife to make the intended husband procure a conveyance of the legal estate from his feoffees to himself, and his intended wife for life, or in tail, in which latter case, the wife used sometimes to alienate the estate after her husband’s death, by fine or recovery, and so give it away from her issue and her husband’s family.

Women seized
of Dower or
Jointures.

Tit. 7. c. 1.

To prevent this practice, a statute was passed 11 *Hen.* 7. c. 20. by which it was enacted, “ that any
 “ woman who had any estate in dower, or for term of
 “ her life, or in tail, jointly with her husband, or only
 “ to herself, or to her use in any manors, &c. the in-
 “ heritance or purchase of her husband, or given to
 “ the

“ the said husband and wife in tail, or for term of life,
 “ by any of the ancestors of the said husband, or by
 “ any other person feised to the use of the said hus-
 “ band or of his ancestors, and should hereafter, be-
 “ ing sole, or with any after-taken husband, discontinue,
 “ alien, release, or confirm with warranty, or by coven-
 “ suffer any recovery of the same, that all such reco-
 “ veries, discontinuances, &c. should be utterly void
 “ and of no effect, and it should be lawful for the
 “ person in remainder or reversion to enter imme-
 “ diately: provided also, that this act extend not to
 “ any such recovery or discontinuance to be had where
 “ the heirs next inheritable to the said woman, or he
 “ or they that next after the death of the same wo-
 “ man should have estate of inheritance in the same
 “ manors, lands, or tenements, be assenting or agree-
 “ able to the said recoveries, where the same assent
 “ and agreement is of record or inrolled.”

This act is confirmed by the statute 32 Hen. 8. c. 36. s. 2. which provides, that no fine levied by any woman of any such estate as is mentioned in the statute 1 Hen. 7. shall be of any effect.

§ 23. These statutes having been made to prevent an injury, have always been construed liberally; and, therefore, every kind of estate created by the fine of a jointress, is held to be void against the heir.

Pigot v.
 Palmer,
 Moor 250.
 3 Rep. 51 b.

§ 24. Thus, where a tenant in tail, who was a jointress within this statute, accepted a fine *sur cognizance de droit come ceo* from a stranger, who granted and rendered

rendered the lands to the jointress for 100 years, it was adjudged, that this was a forfeiture, for, otherwise, the intention of the statute might, by practices of this kind, be entirely defeated.

Jenk. Cent.
6. c 97.
2 Leon. 168.
3—78.

§ 25. With respect to the estates which have been deemed to be comprehended in this act, the same liberality of construction has been adopted, and, therefore, it has been determined, that whenever an estate has been derived, either from the husband himself, or from any of his ancestors, it is protected by this statute.

§ 26. Thus, where the ancestor of the husband made a feoffment in fee, upon condition that the feoffees should reconvey to the husband and wife in tail, this was adjudged to be such an estate as is intended by the statute.

Anon. Mo.
23. pl. 231.
3 Rep. 50 a.
Cro. Eliz.
513. S. P.

§ 27. So, where a man and a woman, being joint-tenants in fee of a manor, intermarried, and afterwards levied a fine thereof to a stranger, who rendered it to them in tail. After the death of the husband, the wife married again, and joined her second husband in levying a fine. It was held that this fine was void, as to the moiety which had originally been the estate of the husband, because it was protected by this statute.

Laughter v.
Humphrey,
Cro. Eliz.
524

§ 28. In the same manner, where one brother, in consideration of a marriage had between his brother and M., covenanted to stand seised to the use of himself for life, and, after, to the use of his brother and his wife for their lives. This was adjudged to be a

Sharrington
v. Strotton.
Plowd. 300.

jointure within the statute. 11 Hen. 7. as moving from the ancestor of the husband.

§ 29. Although lands are settled in consideration of money given by the wife or her friends, yet if the marriage appears to have also constituted a part of the consideration, the estate will be within this statute.

Villars v.
Beaumont,
Dyer 186 a.
Bendl. 29.
Keilw. 2c8 a.
Mo. 93.
p. 231.
Vide infra.
Kirkman v.
Thompson,
S. P.

§ 30. Thus, where a grandfather bargained and sold lands to J. N. for thirty years, remainder to himself and his wife for life, remainder to his son for life, remainder to his grandson, and one S. the daughter of J. N. and the heirs of their two bodies begotten; after which followed these words: “for the which manor, bargain, and other
“the premises, the said J. N. covenants to pay the
“said sum of 70 l. at certain days, &c.” the son afterwards married S. who survived him, and with a second husband levied a fine of those lands. The jury further found *dehors* the indenture, that the indenture and bargain and sale were as well in consideration of the marriage as of the money: it was held by three judges against *Dyer*, that the fine was void, for they expounded the words, “given by the ancestors, &c.” to be any lands assured to the woman in jointure, either for money (as few marriages are made without it) or else freely.

Vide Coplard
v. Platt Sir
W. Jones 254.
Cro. Car. 244.
Jenk. 310.
p. 20.

2 Vern. 489.
1 Ab. Eq.
220.

§ 31. A trust estate, or an equity of redemption, is within this statute, as well as a legal estate; for uses are expressly mentioned in the statute, and a trust is now, what an use was then.

§ 32. With respect to the estates which are not comprehended within this statute, as the object of it was only to prevent women from alienating those lands which were settled on them by their husbands, it therefore does not extend to any lands which were originally the property of the wife, or which were derived from any of her ancestors.

§ 33. Thus, where husband and wife seized of lands in right of the wife, levied a fine *sur cognizance de droit come ceo*, and took back an estate to the husband and wife in tail general, remainder to the heirs of the wife. The husband died, leaving issue a son, the wife married a second husband, with whom she joined in levying another fine, on which the son by the first husband entered for a forfeiture by the 11 Hen. 7. It was determined, that the last fine was no forfeiture by this statute; for as the estate was originally the property of the wife, it would be unreasonable to restrain her from disposing of it, and quite foreign to the intent of the act; for although it might, within the letter of the act be considered as the purchase of the first husband by the first fine, yet it was not so in reality, as the lands were originally derived from the wife.

Eyston v.
Studd.
Plowd. 463.
1 Inst. 366 a.

§ 34. Husband and wife sold lands which were the estate of the wife, and purchased other lands with the money, which were settled on the husband and wife in tail. This was agreed *arguendo*, to be a jointure within the statute, because the money was a chattel vested in the husband, which he might have disposed

Palmer 217.

of as he pleased, and therefore when he laid it out in the purchase of lands, the law will consider them as purchased by the husband.

§ 35. A voluntary gift by a stranger to a husband and wife, is not within this statute.

Ward v.
Walthew,
Cro. Jac. 173.
1 Brownl.
137.
Yelv. 101.

§ 36. The bishop of *Exeter* made a voluntary gift of lands to one *Turner* his servant, and *Sybill* his wife, and to the heirs of their two bodies. The husband died, and the wife levied a fine of those lands: it was resolved that this was not a jointure within the statute 11 Hen. 7. for the lands did not come from the husband, nor from any of his ancestors.

§ 37. If lands are limited by a husband, or by any of his ancestors, to the wife in tail general, without any limitation to the issue or heirs of the husband, such an estate is not protected by the statute 11 Hen. 7. because the object of that statute was to prevent wives from prejudicing the issue or heirs of their former husbands; but where no remainder is limited to such persons, no prejudice can be done them.

Toller v.
Pufal.
Cro. Eliz. 2.
Idem. 524.
1 Leon. 261.
Com. Rep.
369.
Hughes v.
Clubb, S. P.

§ 38. Thus, where a man seized in fee devised lands to his wife in tail general, remainder over to a stranger; after the husband's death, the wife married a second time, and suffered a recovery. The daughter of the first husband entered for the forfeiture, but it was determined, that although this case was within the letter of the statute, yet it was not within the intention

tention of it, the remainder being limited from the heirs of the husband to a stranger.

A jointure limited to a woman in fee is not within this statute for the same reason. 4 Rep. 3 b.

§ 39. Copyhold estates are not comprehended within this statute, for an entry being given to the heir of the husband, he would thereby become tenant without being admitted by the lord. Besides, a copyhold estate is not within the words or intention of the statute, for it cannot be discontinued or conveyed in any other manner than by surrender.

Gillb. Ten.
181.
Harrington
v. Smith.
2 Sid. 41. 73.
4 Mod. 45.

§ 40. This statute was originally construed to extend to a fine levied both by the husband and wife.

§ 41. Thus, where a man seised of lands in fee, levied a fine to the use of himself for life, remainder to the use of his wife, and the heirs male of her body, begotten by him, for her jointure. Afterwards the husband and wife levied a fine, and suffered a common recovery of those lands, and died leaving issue, who entered by force of the statute 11 Hen. 7. and the entry was held lawful; although, as Lord Coke observes, this case was out of the letter of the statute, for the wife neither levied the fine when sole, nor with any after-taken husband, but being within the mischief, it was adjudged to be within the remedy of the statute, the intention of which was to prevent children,

1 Inst 365 b.

who were provided for by such jointures, from being disinherited.

§ 42. The doctrine established in this case has however been contradicted by a more modern determination.

Kirkman v. Thompson,
Cro. Jac. 474.
Rigot. Re-
cov. 81.

§ 43. A father, in consideration of the marriage of his son, and of 200 *l.* portion, covenanted to convey lands to the use of the son and his wife, and of the heirs of the body of the wife, remainder to his own right heirs. A conveyance was made accordingly, and the husband and wife joined in levying a fine of the lands. It was resolved, first, that this was a jointure within the intent of the statute, although part of the consideration was money paid by the father of the wife to the father of the husband. 2dly, That the fine did not operate as a forfeiture, either within the words or intention of the statute, for the wife was not sole, nor was the alienation with an after-taken husband, and the object of the statute was only to provide against the disinheritance of the heirs of the husband contrary to his intention.

Simpson v. Turner,
1 Ab. Eq.
220.

Doct. & Stud.
Dial. 1 c 31.
Lincoln. Col.
Case.
3 Rep. 58.

§ 44. By the 8th and 9th sections of this statute it is provided, that it shall not extend to any recovery to be had with the heirs next inheritable to the woman, or where the person next in remainder consents to the same, provided such consent appears upon record.

§ 45. Lord *Coke* says, that if a man makes a feoffment to the use of himself and his wife in tail, remainder to the use of the husband in fee, and has issue a daughter, and dies leaving his wife enfeint of a son, whereby the reversion in fee descends to the daughter; if the wife and daughter, before the birth of the son, join in levying a fine, or suffering a common recovery, the son may enter and take the benefit of this statute. 3 Rep. 61 b.

§ 46. The right of entry which is given by the statute 11 *Hen.* 7. is not confined to the heir of the husband, but is extended to the person to whom the inheritance is to go after the decease of the woman, whether he be the heir of the husband, or a stranger deriving under the heir of the husband.

§ 47. Thus, where Sir *Richard Bridges* made a feoffment of lands to trustees, on condition that they should give back the same to him and his wife, and to the heirs of their two bodies begotten, remainder to the right heirs of Sir *Richard*, which was accordingly done. Sir *Richard* had issue by his wife a son, named *Anthony*, and died. *Anthony*, in the lifetime of his mother, conveyed the lands by fine to Sir *G. Brown* in fee; the wife afterwards made a lease for three lives, not warranted by the statute 32 *Hen.* 8. whereupon Sir *G. Brown* entered; and the question was, whether his entry was lawful within the statute 11 *Hen.* 7.? It was resolved, that the entry of Sir *G. Brown* was lawful, because he was the person who

Sir G.
Brown's Case,
3 Rep. 50.
Lynch v.
Spencer, S.C.
Cro. El. 513.

who were provided for by such jointures, from being disinherited.

§ 42. The doctrine established in this case has however been contradicted by a more modern determination.

Kirkman v.
Thompson,
Cro. Jac. 474.
Bigot. Re-
cov. 81.

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Simpson v.
Turner,
1 Ab. Eq.
220.

Doct. & Stud.
Dial. 1. c 31.
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Sir G.
Brown's Case,
3 Rep. 50.
Lynch v.
Spencer, S.C.
Cro. El. 513.

had the immediate right to the inheritance after the death of the wife,

Husband
seised jure
uxoris.

Lit. f. 594.

731.

1 Inst. 326 a.

§ 48. By the common law, if a husband, seised of lands in right of his wife, had levied a fine of them without her concurrence, it operated as a discontinuance, by which means, the wife was barred of her entry after the death of her husband, and was obliged to bring her writ of *cui in vita*; and, therefore, *Lit. tleton* observes, that the judges would not permit a man to levy a fine alone of his wife's estate.

This produced the statute 32 Hen. 8. c. 28. f. 6. by which it is enacted, "That no fine, feoffment, &c. by the husband only of any manors, being the inheritance or freehold of his wife, during the coverture between them, shall in anywise be, or make a discontinuance thereof, or be prejudicial or hurtful to the said wife, or her heirs, but that the same wife, or her heirs, shall lawfully enter into such manors, &c. any such fines, feoffments, &c. to the contrary notwithstanding; fines levied by the husband and wife, whereunto the said wife is a party and privy, only excepted."

1 Inst. 326 a.

2 Inst. 681.

8 Rep 71.

Greeneley's
Case.

§ 49. This act having been made to suppress a wrong, and to give the injured party a more speedy remedy than what the common law afforded, it has been construed liberally; so that, where lands were given to a husband and wife, and the heirs of their two bodies, and the husband alone levied a fine thereof and

and died, the entry of the wife was adjudged to be lawful, although the words of the act are, “ being “ the inheritance of freehold of the wife ;” whereas, in this case, the lands were as well the inheritance and freehold of the husband as of the wife,

§ 50. Where husband and wife are joint-purchasers in tail, remainder to the wife in fee, and the husband alone levies a fine and dies, this is an alienation within the statute, Dyer 162.
p. 48.

§ 51. If the husband alone makes a feoffment of his wife’s land, and, afterwards, he and his wife are divorced *causa præcontractus*, yet the wife may enter after the death of her husband, for it is sufficient that she was his wife *de facto* at the time of the alienation. 1 Inst. 326 a.

§ 52. Although the king be not named in this act, yet he is bound by it as well as a subject ; so that, if a husband alone levies a fine of his wife’s land to the king, still the wife may enter after the death of her husband. 1 Inst. 681.
Beaumont’s
Case.

§ 53. If the wife dies before entry, her issue may enter ; and if she has no issue, then the person in remainder or reversion may enter by the very words of the statute. 1 Inst. 326 a.

§ 54. This statute does not extend to copyholds, for the words of it only allude to estates which pass by Moore 596.

by common law conveyances ; and if it were construed to comprehend copyholds, the heir of the wife would become tenant without being admitted by the lord.

Ecclesiastics
seised jure
ecclesiæ.

§ 55. Ecclesiastics seised in right of their churches, are prohibited from suffering common recoveries, upon the same principle that they are prohibited from levying fines.

TITLE XXXVI.

RECOVERY.

CHAP. IX.

Of the Amendment of Recoveries.§ 2. *Writ of Entry.*3. *Names of the Parties.*9. *Description of the Estates.*§ 18. *Exceptions.*24. *There must be something to amend by.*

Section 1.

COMMON recoveries being judicial proceedings, must be carried on according to the established forms and solemnities of a suit at law; but, however, as they are suffered with the consent of all the parties, and considered as common assurances, they have always been construed in the most favourable manner, and, therefore, the Court of Common Pleas has, in many instances, allowed them to be amended.

§ 2. A mistake in the writ of entry, on which a recovery was suffered, was allowed to be amended, by inserting fifty acres instead of thirty. Lord Chief Justice *Eyre* doubted whether the Court had a power to do it, in consequence of the determination in Lord *Pembroke's* case. But Mr. Justice *Rooke* observed, that by the statute 8 *Hen. 6. c. 12.* original writs might be amended, as to mistakes of the clerks.

Writ of
Entry.Crofs and
Grey,
1 Bos. and
Pull. 137.Tit. 35. ch 7.
f. 3.
Henzell v.
Lodge, *infra*.

§ 3. Where

Names of the
Parties.

§ 3. Where an evident mistake has been made in the names or descriptions of the parties, the court has allowed it to be amended.

Chapman v.
Bacon,
Pigot 170.

§ 4. A common recovery was agreed to be suffered, wherein *John Chapman* and *Richard Elton* were to be demandants, and, by the mistake of a clerk, the writ of entry was sued out in the name of *John Chapman* and *John Elton*; the recovery was allowed to be amended.

Pigot 170.

§ 5. A warrant of attorney was given, in order to suffer a common recovery, by *William Reynolds* and *Hester* his wife; the serjeant who took the warrant of attorney, certified the same to be given by *William Reynolds* and *Margaret* his wife, and the *mittimus* and transcript were made of a warrant given by *Margaret*, and the recovery was entered accordingly, but it was allowed to be amended.

Thurban v.
Pantry,
Pigot 171.

§ 6. A common recovery was suffered by *R. Callow* and *Ux'*, without mentioning the name of the wife, and it was allowed to be amended.

Mayre v.
Coulthard,
2 Black. R.
1230.

§ 7. A recovery was allowed to be amended, by changing the words *Ann* the wife of *Henry Goodwin* to *Elizabeth*, in conformity to a fine and deed to lead the uses.

Lord and
Biscoe,
Barnes 24.

§ 8. A rule was made absolute to amend a recovery, by transposing the names of the demandant and tenant
pursuant

purſuant to the deed, making a tenant to the *præcipe* by the recovery. *Bifcoe* had been demandant, and *Lord* tenant; by the deed, *Lord* was to be demandant, and *Bifcoe* tenant.

§ 9. In the ſame manner, where a miſtake had been made in the deſcription of the eſtates intended to be comprehended in a recovery, it has been allowed to be amended.

Description
of the Eſtates.

§ 10. A common recovery was agreed to be ſuffered of lands in *Alphampton* and *Magna Hermney*, in the county of *Effex*; but, by miſtake, the ſame was ſuffered of lands in *Alphampton* and *Lamarſh*, and it was ordered to be amended.

Skinner v.
Laud,
Pigot 171.

§ 11. A common recovery was agreed to be ſuffered of lands in *New Church*, *Levington*, and *Merſham*, but *New Church* was totally omitted. Upon examining the deed to lead the uſes, it was ordered to be amended.

Whitwell
v. Maſters,
Pigot 172.

§ 12. A common recovery was agreed to be ſuffered of two meſſuages and one garden in *London*, but being only ſuffered of one meſſuage, it was allowed to be amended.

Brooke v.
Biddolph,
Pigot 172.

§ 13. The *præcipe* and writ of entry in a common recovery were allowed to be amended, by adding the names of ſeveral pariſhes which had been omitted.

Jenkinſon v.
Staples,
Pract. Reg.
C. P.

§ 14. The

Henzell v.
Lodge,
2 Black. R.
747.
3 Will. R.
154.
Wheeler v.
Hefeltine,
2 Bos. & Pul.
560.

Milbank v.
Joliffe,
Id 580.

§ 14. The deed to lead the uses of a recovery, mentioned "all the vouchee's lands in *Aldenham*, or elsewhere, in the county of *Kent*, in the occupation of " *Robert Goddard*." *Robert Goddard* rented one entire farm of the vouchee (all sworn to be intended to pass by the recovery), being principally in the parish of *Aldenham*, but part thereof lay in the parish of *Mersham*, which was not known to the parties when the recovery was suffered. The court, after taking a day to consider of it, allowed the recovery to be amended, by inserting the word *Mersham*.

Watson v.
Cox,
2 Black.
R. 1065.

§ 15. On a motion to amend a recovery of lands, &c. in the town of *Kingston-upon-Hull*, by inserting the words *in Myton*, and the words *and county*, thereby making the description of the lands to be "in *Myton*, "in the town and county of *Kingston-upon-Hull*." The deed to lead the uses described the parcels to be situate "in the lordship of *Myton*, in the county of " *York*, or in the town and county of *Hull*, lately "purchased of *Thomas Yates*." And it was proved by affidavit, that one *William Crowle* purchased of *Thomas Yates* the lands intended to pass, being in the township of *Myton*, in the town and county of *Kingston-upon-Hull*, and, in 1728, settled them successively on *George* and *Richard Crowle* in tail: that *George* died without issue, and *Richard* being then tenant in tail, and having no other lands in *Kingston-upon-Hull*, did, in 1754, suffer this recovery. The court directed notice to be given to the tenant, and, on his consenting, made the rule absolute.

·§ 16. A recovery, which had been suffered nine years before, was ordered to be amended, by putting the word *Trul*, the name of a vill, into its proper place, according to the deed of uses. *Trul* had been by mistake put into the recovery as an advowson, not as a vill where land lay. It was objected against this amendment, 1st, That the estate was in trustees at the time of the recovery, and, consequently, the trustees not being parties, there was no good tenant to the *præcipe*. 2dly, That the lands were customary tenure. 3dly, That the parties who suffered the recovery were volunteers. 4thly, That the wife of *Pullen*, the vouchee, was dead, and a recovery could not then be suffered to bar the remainders. The court said, they would not enter into the question, whether, in equity, recoveries of trust estates would bar legal remainders, or into the other objections. When the recovery was amended, *valeat quantum valere potest*, the intention of the parties was the foundation for the amendment. The transaction appeared to be fair, and without fraud or collusion. The principle upon which they went, was the statute 8 *Hen. 6.* to amend the misprision of the clerk. A *præcipe* was the curfitor's instruction for an original writ. A deed of uses was the clerk's instruction for a recovery. The *præcipe* and deed were the things to amend by ; and, Mrs. *Pullen* being dead, an amendment was the only remedy left.

Loggin and
Pullen,
Barnes 21.

Dowse v.
Reeve, 2 Bos
and Pull 578.

§ 17. The court will not grant leave to amend a recovery on affidavit only ; it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment.

In

Pearson v.
Pearson,
1 H. Black.
R. 73.

In a recovery, a farm called *Thieffside*, otherwise *Thiewishead*, was described to be situated in the forest of *Inglewood*, in the parishes of *Heskit in the Forest*, and *St. Mary's Carlisle*, or one of them, in the county of *Cumberland*. It was afterwards discovered, that the whole of the said farm was not within the parishes of *Heskit in the Forest*, and *St. Mary's Carlisle*, as described in the recovery; but that part of it was in the parish of *Lazonby*, in the county of *Cumberland*. It was moved to amend the recovery, by inserting the words "the parish of *Lazonby*" on an affidavit of the owner of the lands, the vouchee, stating as above, and that he meant to include all his estates in the county of *Cumberland* in the recovery, and that he did not know when he suffered the recovery, that any part of the said farm was in the parish of *Lazonby*. The court would not, on this affidavit alone, grant leave to amend; but, upon reading the deed to lead the uses, there was found the following clause: "And all other the estates, manors, or lordships, messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in the county of *Cumberland*." This was holden by the court sufficient to warrant an amendment, as it appeared on the face of the deed itself; and the rule for amendment was made absolute.

Exceptions.

§ 18. No amendment, however, will be allowed in the description of the estates comprehended in a recovery, where the recovery, as it stands, has lands of the vouchee to operate upon.

§ 19. Thus, where a motion was made to amend a recovery, by striking out the city of *Litchfield*, and inserting the county of *Stafford*, with other consequential amendments, whereforever the names of the county and sheriff occurred, and also, by inserting *Longden* (the name of a vill) after *Abnall*, another vill named in the recovery. The court observed, that it was a gross mistake in the attorney concerned in suing out only one recovery instead of two, and that they would willingly give the parties all the assistance they legally could to effect their evident intent, but it was beyond their power. In the cases of amendments which had been cited, the party had no estate in the vill, or county, struck out; therefore, *quoad hoc*, the recovery had no operation; but the present application was, to annul a valid recovery in the city of *Litchfield*, which had operated upon lands therein for near forty years, and to substitute in its stead a recovery in the county of *Stafford*. The motion was refused.

Atton v.
Baldwin,
2 Black.
R. 874.

§ 20. Where there has been a mistake of the clerk in the words of the judgment, the court has ordered it to be amended.

§ 21. Thus, there are two instances where, upon motion to amend a recovery, by striking out the words *it is adjudged*, and inserting the words *it is considered*, the court have ordered it to be done, as such an amendment related to the act of the court in giving judgment.

Barnes 20,
22.

§ 22. Amendments are also allowed in the writ of *seisin*, and the return thereof.

Wilton and
Fairfax,
Barnes 23.
Watson and
Lockley,
2 Will. R. 2.

§ 23. Thus, where a writ of *seisin* was rightly directed to the sheriffs of the city of *York*, but not returned in the name of any sheriff, though a mistaken return in the singular instead of the plural number was indorsed on the writ. The prayer of *seisin* and return of the writ were ordered to be first amended, and then the roll and exemplification accordingly.

There must
be something
to amend by.

§ 24. No amendment is allowed in a common recovery, unless there is an evident mistake of the clerk, or something to amend by.

Ante ch. 5.
f. 13.
Barnes 17.

§ 25. Thus, in the case of *Wynne* and *Wynne*, an application was made to the Court of Common Pleas, to amend the *teste* and return of the writ of entry, and a rule to shew cause. The court, after hearing counsel on both sides, and consideration, was of opinion, that all amendments must be consistent with the rules of law, and there must be something to amend by. In this case, the vouchees, by law, could not appear until the return-day of the writ of summons, and the power of attorney given by *Alithea* to appear on that day was revoked by her death in the intermediate time. By the statute 8 *Hen.* 6. original writs are amendable, if wrong, by misprision of the clerk, or where there is any thing to amend by. Here was no misprision of the clerk, the writ was made agreeable to his instructions, and there was nothing to amend by;
the

the amendment prayed, is to amend in the first instance. The rule was discharged.

§ 26. By the statute 23 *Eliz. c. 3. f. 10.* it is enacted, that no recovery suffered before that act, which shall be exemplified under the great seal, shall, after such exemplification, be in anywise amended. And by the statute 27 *Eliz. c. 9. f. 10.* no recovery suffered before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverfordwest*, or under the seal of any of the counties palatine, shall, after such exemplication, be in anywise amended.

TITLE XXXVI.

RECOVERY.

CHAP. X.

Of the Operation of a Recovery in barring Estates Tail, Remainders and Reversions.

- | | |
|--|---|
| § 1. <i>Ancient Modes of barring Estates Tail.</i> | 38. <i>Of Recoveries with Single and Double Voucher.</i> |
| 12. <i>A Recovery is a good Bar to an Estate Tail.</i> | 55. <i>Effect of Recoveries in barring Remainders and Reversions.</i> |
| 23. <i>Of Joint Vouchers.</i> | |
| 35. <i>An Intail of a Rent barred by a Recovery.</i> | 61. <i>The Power of suffering a Recovery cannot be restrained.</i> |

Section 1.

Ancient
Modes of
barring
Estates Tail.

THE variety of inconveniencies which were produced by the statute *de donis*, and the impossibility of obtaining a parliamentary repeal of it, induced the judges to adopt every possible means of evading and invalidating its effect; but the progress was gradual, and it was a long time before it was completely effected.

§ 2. The first rule which the judges adopted on this subject was, that the issue in tail could not avoid the alienation of his ancestor, provided the issue was left a recompence in value by his ancestor, for the estate tail which he had alienated.

§ 3. Thus,

§ 3. Thus, it was determined very soon after the statute *de donis*, that if a tenant in tail lost his estate tail, and recovered over in value; such recovery in value was a good bar to the estate tail, because the issue was not prejudiced.

10 Rep. 37 b.
2 Black. Com.
303.

§ 4. It was also determined upon the same principle, that a lineal warranty, with assets, was a good bar to the issue in tail. However, Lord *Coke* observes, that if a tenant in tail, aliened with warranty, leaving assets to descend, and the issue in tail aliened the assets, and died, the issue of that issue should recover the estate tail, because the lineal warranty descended to him *without* assets, which shews that the issue in tail could not be barred, unless he had a full recompence in value.

Litt. f. 712.
Idem 749.
1 Inst. 393 b.
10 Rep. 37 b.

§ 5. The rule, that the issue in tail could not avoid the alienation of his ancestor, provided he had a recompence in value, was still farther extended, by a decision of the judges, in 44 *Edw.* 3. by which it was determined, that if tenant in tail granted a rent-charge in consideration of a release of right, to a person who had a prior right to the estate, such a grant should bind the issue in tail, because it was made for his benefit, and the estate tail descended to him as a recompence for the grant.

§ 6. Thus, where a person brought a replevin for taking his cattle, the defendant avowed, for that one *Nicholas* was seised in tail of the manor of *B.* and had issue *John* and *Joan*; *Nicholas* died, *John* being then

Octavian
Lumbard's
Case.
44 Ed. 3.
Year book 21.

in *Ireland*; *Joan*, the daughter, entered, and died seised, leaving issue a son, named *Nicholas*, who entered; *John*, the son, having returned from *Ireland*, sued for the land, but agreed to release all his right to the estate tail to his nephew, *Nicholas*, in consideration of a grant from *Nicholas*, of a rent of 20*l. per annum*, with power of distress. This rent being afterwards in arrear, a distress and avowry were made on the lands charged, which were then in the possession of the issue of *Nicholas*. The court was of opinion, that as *Nicholas*, who was tenant in tail, granted this rent in consideration of a release of right from *John*, who was really entitled to the estate tail; the grant was good, and sufficient to bind his issue in tail, because the estate tail descended to them as a recompence for this rent.

§ 7. In the preceding modes of barring estates tail, it may be observed, that the recompence in value, which descended to the issue in tail, was a real and *bona fide* recompence. But in 12 *Edw. 4.* a case arose in which the judges carried this principle to a much greater length, and determined, that a nominal and fictitious recompence, descending to the issue in tail, should be an effectual bar, not only to the issue in tail, but also to all persons in remainder or reversion; and as the validity of recoveries depends even at this day on the authority and principles laid down in that case, it will be proper to state it at full length,

§ 8. *I. B.* being seised in fee of the lands in question, gave them to one *William Smith*, to hold to him and

and the heirs of his body, by force of which he was seised. *William Smith* died, leaving *Humphrey* his eldest son, on whom those lands descended, who entered, and was seised *per formam doni*. *Humphrey* enfeoffed one *Tregos* of the said lands in fee, who rendered them to the said *Humphrey* and *Jane* his wife, and to the heirs of their two bodies, remainder in fee to the said *Humphrey*, by force of which they were seised. Some time afterwards *Jane* died, on which *Humphrey* became sole seised of the said lands in tail; and being thus seised, one *Taltarum* brought a writ of right against *Humphrey*, and counted of his possession against him. *Humphrey* made defence, and vouched to warranty one *R. King*, who entered into the warranty, and joined the mise on the mere right; afterwards *R. King*, the vouchee, made default, and departed in contempt of the court; in consequence of which, final judgment was given, that the demandant *Taltarum* should recover the lands in question against *Humphrey*, and that *Humphrey* should recover lands of equal value of *R. King*, the vouchee. *Humphrey* afterwards died, without leaving heirs of his body, and the question was, whether *Richard* the brother of *Humphrey*, who was heir in tail to those lands, should be barred by this recovery? It was determined by all the judges, that the estate tail was not barred by this recovery, because the tenant in tail was not seised of the estate tail at the time of the recovery, but of another estate; and as the recovery in value goes according to the estate whereof the tenant was seised at the time of the recovery, and not in recompence of the estate he had not, the issue in tail could have no

Vid. 13 E. 1.
No. 1. p. 1.
Bro. Abr. tit.
Recovery in
Value, 19.

recompence in this case, and therefore was not barred by the recovery.

Pigot 9.

It is observable, that this case was conducted with a good deal of art; for at first sight the decision seems to be against the validity of a common recovery, in barring estates tail, but from the arguments of the judges it appeared they were all of opinion, that if the tenant in tail had been actually seised of the estate tail at the time of the recovery, the recompence in value would then have descended in lieu of the estate tail, and therefore the issue in tail would have been barred.

All the writers on our law have dated the æra of common recoveries from this decision, although the preceding cases shew, that so early as the reign of *Edward 3.* the judges were extremely well inclined to give tenants in tail every assistance for enabling them to unfetter their estates.

§ 9. It is evident from this case, that the reason on which the judges grounded their original determination, that a common recovery was a good bar to an estate tail, was, because the issue in tail had a recompence in value, either real or fictitious, for the estate tail which was recovered; but as several cases arose in which the recompence in value could not possibly extend to all the estates which were barred, the judges have at different times exerted their ingenuity in inventing other reasons to support the validity of common recoveries. Thus, in the case of *Hudson v. Benson*, in *Mich. 23 Car. 2.* Lord Chief-Justice Hale

2 Lev. 29.
Freem. 363.

is reported to have said: “the recompence of the
 “value is the reason of the bar by common reco-
 “veries, as to the issue in tail; but not the reason
 “why it bars, as to him in remainder or reversion.
 “But the reason in this case is, because the recoveror,
 “in supposition of law, is in of the estate tail, and
 “that in judgment of law has still continuance; as at
 “Common Law, the donee, *post prolem suscitata*,
 “might have aliened and barred the donor; and a
 “common recovery is, as it were, a conveyance ex-
 “cepted out of the statute *de donis*, and the recoveror
 “is in of the estate which the donee had; but the
 “issue in tail is barred to claim it, in respect of a
 “supposed recompence by the recovery.”

§ 10. In Mr. Ratcliffe's case, which was argued 1 Stra. 289,
 before the Lords Delegates 6 Geo. 1. Mr. Baron
 Mountague observes that the words of Sir M. Hale
 respecting recoveries had been cited, and said, “I
 “never found my opinion on the *dictums* of reporters,
 “in which they are very apt to mistake the words and
 “sense of the judges from whom they take them;
 “and so it seems to be in that case. Lord Hale is
 “there reported to have said, that the recompence
 “in value is not the reason why common recoveries
 “are bars to the remainder-men, but because those
 “are conveyances excepted out of the statute *de donis*.
 “But it is the text of *Litt. f.* 668. that if tenant in
 “tail suffered a feigned recovery, the issue might
 “falsify it in a *formedon*. This shews that at Com-
 “mon Law such recoveries as we now make use of
 “to bar estates were not known; and therefore it
 “would

“ would have been ridiculous in the statute *de donis*
 “ to have excepted recoveries, since common reco-
 “ veries were not used, and recoveries on good title
 “ could not be imagined to be included. If issue was
 “ taken on the disseisin alledged in the writ of entry,
 “ and found for the demandant, and so the recovery
 “ on a point tried, this at common law would bar
 “ the issue, there lying an attaint against the jury;
 “ though where it was by default it would not. But
 “ afterwards another middle way was found out and
 “ favoured by the judges, to prevent the inconveni-
 “ ence of perpetuities; and that was, where the
 “ tenant in tail appeared and vouched over, and the
 “ vouchee made default, and so there was a judgment
 “ for a recompence to one, and for the lands de-
 “ manded to the other. This judgment, though by
 “ default, and without issue tried, was held a bar, on
 “ account of the recompence in value.”

Salk. 563.

§ 11. It is extremely clear, from what has been
 premised, that the effect and validity of common reco-
 veries cannot be supported by any of the maxims or
 principles of the common law, but that they are, *a*
fictio juris, adopted for the purpose of destroying that
 species of perpetuity which was created by the statute
de donis; and the numerous advantages which arose
 from the decision of the court, in 12 *Edw. 4.* was a
 sufficient justification of it. Besides, common reco-
 veries have now continued so long, and their utility
 is so fully understood, that the determination of the
 judges in *Taltarum's* case, so far from being consi-
 dered as an unwarrantable stretch of their authority,
 must

Law of For-
feit, 83.

1 Bla. R. 254

3 Burr. 115.

Vide Willes
Rep. 449.

must on the contrary be acknowledged to have been a measure of great public utility, and from which this country has derived infinite advantage.

§ 12. But whatever were the reasons on which the validity of common recoveries was originally founded, it may now be laid down as a certain maxim, or rule of law, which has prevailed for many centuries, that a common recovery is a common assurance, whereby all tenants in tail are enabled, by pursuing the proper form of this assurance, to bar their estates tail: And in *Mary Portington's case*, 11 Jac. 1. it was determined by all the judges, that judgment given against tenant in tail with voucher, and recompence in value, would bind the estate tail, notwithstanding the statute *de donis conditionalibus*, whether the recovery was upon good title or not; and that the judgment given in such a case, for the tenant in tail to have in value, would bind the estate tail, although no recompence was had*.

A Recovery,
is a good Bar
to an Estate
Tail.

10 Rep. 37 b.

* The following passage shews how strongly the judges have always supported common recoveries. "At the Parliament held in the reign of the late Queen *Elizabeth*, in the great case between *J. Vernon* and Sir *Edward Herbert*, which was argued by learned counsel before the Lords in Parliament; there *Hoord*, an utter barrister of counsel, with *Vernon* (who was barred by a common recovery) rashly and with great ill-will, inveighed against common recoveries, not knowing the reason and foundation of them; who was with great gravity and some sharpness reproved by Sir *James Dyer*, then Chief Justice of the Common Pleas, who said, he was not worthy to be of the profession of the law, who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority." 10 Rep. 40 a.

§ 13. A com-

§ 13. A common recovery is a good bar to the issue in tail, although the tenant in tail dies before the recovery is executed.

Shelly's Case,
1 Rep. 93.
1 Inst. 361 b.
Dyer 35,
pl. 28.

§ 14. Thus where a tenant in tail suffered a common recovery, and died on the same day, before the court had awarded a writ of *habere facias seisinam*; and it being doubted whether execution might be sued against the issue in tail, the majority of all the judges were of opinion, that execution might be sued against the issue in tail; for the right of the estate tail was bound by the judgment given against the tenant in tail, and the judgment over to recover in value, because common recoveries were common assurances of land. But if a recovery be against tenant in tail upon a false title, who dies before execution, in a *scire facias* against the issue in tail, he may avoid it.

1 Inst. 361 b.

1 Rep. 135 b.
136 a.
Litt. f. 649.

§ 15. If a tenant in tail is disseised, and releases to the disseisor, the estate tail is in abeyance: yet the tenant in tail may suffer a common recovery, which will bar the estate tail, the remainders, and reversion.

Herbert v. Binion,
1 Roll. Rep. 223.
Popk. 100.
Barton v. Lever,
Cro. Eliz. 388.

§ 16. If a tenant in tail levies a fine with proclamations, and afterwards suffers a common recovery, although the estate tail was destroyed by the fine, yet still the recovery will bar the remainders and reversion depending on the estate tail. The reason usually given for this determination is, that when the tenant in tail is vouched, and comes in upon the voucher, he comes in of all the estates which were ever in him; and as the estate tail was once in him, it is therefore barred.

Roll, in his Abridgement, says, the reason of the determination is, because a common recovery is a common assurance. It has also been said, that the tenant in tail, after levying a fine with proclamation, has still a *scintilla juris* in him, which enables him to bar the remainders.

2 Roll. Abr,
394.

2 Atk. 20.

§ 17. In case a tenant in tail levies a fine, and then dies, leaving issue, it seems to be a doubtful point, whether such issue, by being vouched in a common recovery, can bar the remainders and reversion depending on the estate tail. No case of this kind has, I believe, ever been judicially determined; but it is highly probable, that if a case of this nature arose, the judges would determine, that the remainders depending on such an estate might be barred by a common recovery, in which the issue in tail was vouched; for otherwise such remainders and reversion must continue to subsist as a future estate or interest, to take effect in possession upon the remote event of a general failure of issue of the tenant in tail, incapable of being barred or destroyed by any means whatsoever. This would be a perpetuity to a greater degree than what is allowed by our law, or should be permitted in any commercial country.

2 Atk 201.
Vide Fearn's
Opinions 442.

It may also be observed, that if a tenant in tail after levying a fine has still in him a *scintilla juris* sufficient to enable him to suffer a common recovery, that *scintilla juris* descends on his death to the issue in tail, and therefore they are as well enabled to suffer a common recovery, as their ancestor was.

§ 18. It

1 Roll's Abr.
394.
Godb. 218.
1 Keb. 30.
398.

§ 18. It has been determined, that if a tenant in tail be attainted of treason, and afterwards suffers a common recovery, it will not destroy the remainder or reversion, because a person attainted is not capable of taking any thing but for the benefit of the king, and consequently the recompence in value must go to the king; so that the person in remainder can have no benefit from it, and therefore is not barred: besides, recoveries being common assurances, the recovery of a person attainted must be void in the same manner as any other conveyance of his would have been.

Recov. 73.

Mr. *Pigot*, however, seems to think, that there is such a *scintilla juris* in the tenant in tail, after an attainder; that by a common recovery he may bar his issue, the remainders and reversion; for if the king should pardon the party, and restore the land, he might bar the entail, although the attainder remained in force.

1 Inst. 349 *b*.
3 Rep. 3 *a*.
10 Rep. 38 *a*.

§ 19. An erroneous recovery suffered by a tenant in tail will bar his issue as long as it continues in force.

Machill v.
Clerk; Com.
Rep. 119.
Salkeld, 619.
Rep. temp.
Holt, 615.
Cro. Eliz. 471.
Tit. 2. c. 2.
f. 18.

§ 20. If a tenant in tail covenants to stand seised to the use of himself for life, with remainder to his son in tail, and afterwards suffers a common recovery, with single voucher, to other uses in fee, the recovery is good; for where a tenant in tail covenants to stand seised to the use of himself for life, remainder to his issue in tail, it is absolutely void, and does not alter the estate.

§ 21. By

§ 21. By the statute 14 *Eliz.* c. 8. which has been stated in a former chapter, all recoveries suffered by tenants for life are declared void; but there is a proviso in that act, declaring that it shall not extend to recoveries where the *præcipe* is brought against the tenant for life, and the person next in remainder in tail is vouched; for in such case the recovery is good, and will bar the estate tail.

§ 22. Thus, where *A.* being tenant for life, with remainder to her son in tail, a *præcipe* was brought against *A.* who vouched the son, who vouched over the common vouchee, by which means a common recovery was suffered. All the judges were of opinion, that the recovery was good, and not within the statute of 14 *Eliz.* c. 8. and that the estate tail, and the remainders and reversion, were well barred.

Jenning's
Case,
10 Rep. 43.

§ 23. If a *præcipe* is brought against a tenant in tail and his wife, where the husband is sole seised and the wife has nothing, and they both vouch over in the usual manner, it will bar the estate tail.

Of Joint
Vouchers.

§ 24. Thus where *John Trevilian*, being tenant in tail, suffered a common recovery, in which he and his wife vouched over the common vouchee. It was objected, that the recovery was not effectual to bar the estate tail, because the wife was named in the *præcipe* as joint tenant with her husband, and appeared and vouched as joint tenant; and the vouchee entered into the warranty, admitting that he ought to warrant to them, whereby he also admitted that the wife had an estate

Eare v. Snow;
PlowJ. 514.
18 Vin. Ab.
214.

estate in the tenancy, and had cause to vouch; and as she ought to have the recompence in value by conclusion, there was therefore no reason why the issue in tail should be barred; for the reason that an estate tail is allowed to be barred by a common recovery is, on account of the recompence in value, which is, or by possibility may be rendered; and if the wife was entitled to the recompence in value, and not the issue in tail, then there was no reason why the issue should be barred. But the judges were unanimously of opinion, that in this case the estate tail was barred, for it was expressly found by the verdict, that the wife had nothing in the tenements at the time of the recovery, but that the husband was sole seised in tail; and as he alone lost the tenancy, the recompence should go to him, and should be of the like estate with that he had lost.

§ 25. If a *præcipe* be brought against a tenant for life and the remainder-man jointly, and they vouch over, such a recovery has been determined to be no bar to the estate tail.

Leech v.
Cole,
Cro. El. 670.
2 Roll's Abr.
495.
3 Rep. 6 b.

§ 26. Thus where a person was tenant for life, with remainder to his eldest son in tail, and a *præcipe* was brought against the father and son jointly, who vouched over the common vouchee. It was held by three judges against one, that the estate tail of the son was not barred by the recovery; for the lands recovered in value must go in the same manner in which the estate that was lost would have gone; whereas, in the present case, there being a joint *præcipe* brought against

against the tenant for life and the person in remainder, they must be supposed to be joint tenants, and the judgment must be accordingly; that as the reason why a recovery bars an estate tail is on account of the recovery in value, and as it cannot be averred that the lands recovered in value shall go in any other manner than that which is stated in the record, it follows, that the issue in tail can have no recompence.

Mr. Pigot observes, that these reasons favour of a wonderful subtilty; and that although no man would venture to suffer a recovery in this manner, yet that if a question of this kind was now agitated, these distinctions would not be so easily admitted of, since the courts of law adopt every mode of supporting common recoveries, as assurances commonly used for the conveyance of estates. And in the case of *Page* and *Hayward*, the judges seem to have been of opinion, that a recovery of this kind would bar an estate tail.

§ 27. In that case a tenant in tail and the person in remainder joined in making a tenant to the *præcipe*, who vouched them jointly, and they in the same manner vouched over the common vouchee. It was objected, that as the voucher was joint, the recovery in value must be joint, and so the tenant in tail and the person in remainder must recover moieties in value; whereas the whole was recovered against the tenant in tail, and consequently, to bind the issue, he ought to recover in value the whole; so that the recovery in value not being proportionable to the loss, it

Page v.
Hayward,
Pigot 176.
2 Salk. 570.
Rep. temp.
Holt, 618.

was void. Lord Chief Justice *Holt* delivered the opinion of the court. As to the validity of the recovery in barring the estate tail, he observed, that if a *præcipe* was brought against a tenant in tail in possession and a stranger in an adversary action, and a recovery was had, it would be good: for when a *præcipe* was brought against several persons, it was not necessary that they all should be tenants of the freehold, for if any one of them had the freehold, it would be sufficient. And if the bringing a *præcipe* against a tenant in tail and a stranger would not vitiate a recovery, neither would a joint voucher; for when the vouchee comes in and enters into the warranty, he is as much tenant in law to the writ, as if the *præcipe* had been originally brought against him; and so the case of a stranger being vouched jointly with the person who is seised of the estate did not differ from the case of a stranger being made tenant to the writ jointly with the person who had the freehold. If a tenant in tail conveyed the freehold to a third person against whom a *præcipe* was brought, and he vouched a stranger who vouched the tenant in tail, and the tenant in tail entered into the warranty, and vouched over the common vouchee, this would be a good recovery; for in an adversary action, if the tenant to the *præcipe* vouched a stranger who never had any estate in the land, there was no remedy for it; the demandant could not counterplead the voucher, until the statute of *Westminst. 1. c. 40.* which was productive of great inconvenience, for when a *præcipe* was brought against the tenant of the land, he might vouch a stranger, and that stranger might vouch another stranger,

stranger, and so on *in infinitum*; and therefore the statute gave the counter-plea, that neither the vouchee, nor any of his ancestors were ever seised of the lands in question, by which they might have enfeoffed the tenant or his ancestors; but with this exception, unless the warrantor were present, and would *gratis* enter into the warranty. If a stranger be a good vouchee, he becomes a good tenant to the writ, and a release to him by the demandant after he has entered into the warranty is good, and the vouchee may plead it after the last continuance, for it is as valid as if it had been made to the tenant himself. Nor is it material whether there was any real warranty between the tenant and the vouchee when it is once admitted upon record, for it is then the same as if there really had been a warranty. The principal difficulty in the case was, because the recovery in value was not proportionable to the loss, for by the joint voucher the recovery in value must be joint, whereas the vouchees were tenants in tail of the whole, the one in possession, the other in remainder, and this would be a great objection, if the case were considered upon the foot of the estoppel, for the tenant in tail will be estopped during his life from claiming more than a moiety of the recompence in value, but after his death the issue in tail will not be estopped, but may say that the tenant in tail in remainder had no estate in possession in the land, so the recompence in value will go to him only. And there is no difference between this case and that of *Eare v. Snow*, in *Plowden* 514. where the husband was tenant in tail of lands, and a *præcipe* being brought against him and his wife, they vouched

Amc.

over the common vouchee, and the recovery was held to be good, though it was objected that the recompence in value, which was the cause of the bar, should, if the wife survived, go to her, and therefore the issue in tail was not barred. But it was held, that the issue in tail should not be bound by any estoppel which his father admitted, by joining in the voucher with his wife, but might say that his father was sole tenant in tail, and the wife had lost nothing, and he being the person who had lost the whole, should have the whole recompence.

There was a case in *Trin.* 1657, *Rot.* 179, or 180, between *Murrell* and *Osborn* (of which his Lordship said he had a report in the hand-writing of Lord Chief Justice *Bridgman*) where, in a formedon the tenant in tail pleaded in bar a common recovery on a *præcipe* against the grantee of tenant in tail, in which the tenant in tail and a stranger were jointly vouched, and vouched over the common vouchee, and it was resolved that the recovery was good. And there was also a case 23 *Hen. 8.* *Brooke's Ab. tit. Recoveries in Value* 27. where a woman was tenant in tail, and a *præcipe* being brought against her and her husband, they vouched over the common vouchee, and the recovery was held good, though the husband survived, because the recompence went in the same manner as the land recovered would have gone. This case was full in point, for the husband was as much a stranger to the wife's estate tail as any other person; and so in *Eare* and *Snow* was the wife to the husband; the only difference being, that in the case in *Brooke* the husband

must

must have been named, whereas in that of *Eare* and *Snow* the wife need not. His Lordship concluded with citing the case in 1 *Inst.* 376 *a.* and *b.* where it is laid down, that if the heir at Common Law, and the heir in *Borough English* are jointly vouched, and vouch over the common vouchee, the heir in *Borough English* will have the whole recompence in value, because it is he who sustains the loss, and so of heirs in Gavelkind—Judgment was given that the recovery barred the estate tail.

Vide Fearn's
Opinions 338.

§ 28. It appears from this case, that where the tenant for life and the person entitled to the remainder in tail are jointly vouched in a common recovery it is good, and will bar the estate tail. And recoveries are now frequently suffered in this manner.

Fig. Recov.
27.

§ 29. Where two persons are seised as joint tenants for life, with a remainder in tail to one of them, the person who has the remainder in tail may suffer a common recovery, which will bar his moiety of the estate for life, and also a moiety of his estate tail, for a recovery severs the jointure.

1 *Inst.* 185 *a.*

§ 30. Thus, where a gift was made to *Lionel Morris* and *Ann Miles*, of the manor of *M.* to hold to the said *Lionel* and *Ann*, and to the heirs of the body of the said *Lionel*, remainder over. A writ of entry was brought against the said *Lionel*, who vouched over the common vouchee, and judgment was given, and execution had according to the usual form of common recoveries. It was unanimously re-

Marquis of
Winchester's
Case,
3 Rep. 1.

solved, that although *Ann Miles* was jointly seised with the said *Lionel* for her life, so that as well *Lionel* as the vouchee might have abated the writ, yet when the vouchee, without demand of any lien, entered generally into the warranty, and thereby admitted the writ good; and *Lionel* recovered in value against the vouchee, who entered, according to the estate of the person who vouched; therefore, as to one moiety, the recovery was a good bar to the estate tail, and to the remainder over, because the jointure was severed; but as to the other moiety, whereof *Ann Miles* was tenant for life, the recovery was no bar either to the estate tail, which *Lionel* had, expectant on the estate for life of *Ann Miles*, or to the remainder, because for this moiety *Lionel* was not tenant to the *præcipe*.

Litt. f. 291.
 2 Inst. 187 b.
 Tit. 18. c. 1,
 f. 35.

§ 31. Husband and wife being considered in law as one person, if an estate be limited to them and the heirs of their bodies, or to them and their heirs, they do not take by moieties, but are seised of one entire estate, and the husband alone takes nothing; not the whole estate, because the wife has a joint estate with him in possession; nor an undivided moiety of the estate, because there are no moieties between husband and wife; so that if the husband alone suffers a recovery of an estate of this kind, it will be no bar, either to a moiety or to the whole,

Owen v.
 Morgan,
 3 Rep. 5.

§ 32. Thus, where lands were rendered by fine to husband and wife for life, and to the heirs of the body of the husband. A *præcipe* was brought against the husband, who suffered a common recovery, with voucher

voucher over of the common voucher, the wife being then alive. It was resolved, that this recovery, suffered by the husband only, should not bind the remainders, because there are no moieties between husband and wife, and the husband has no power to sever the joint tenancy, or to dispose of the land, during the life of the wife, he not being seised by force of the intail; and although the husband survived the wife, yet that was not material, because the law considered the case as it was at the time of the recovery.

§ 33. So, where it was found, that the grandfather covenanted to stand seised to the use of himself and his wife for their lives, with remainder to the heirs male of the said grandfather, on the body of the said wife begotten, remainder over; the grandfather suffered a common recovery and died, his wife having survived him. To support this recovery it was contended, that the case of *Owen v. Morgan* was not law; for if baron and feme had an entirety, then each had the whole, and therefore the baron might make a good tenant to the *præcipe* for the whole. *Pemberton contra*, that case was never questioned; the wife's estate hinders the intail from executing in the baron; so that it is only a kind of contingent estate after the death of the wife; and the estate tail cannot be tacked to the estate for life of the husband, during the life of the wife, because, during her life there is an intervening estate; it was therefore adjudged, that the recovery was void.

Clithero v. Franklin,
2 Salk. 568.

1 Inst. 187 a.

§ 34. It should be observed, that although where an estate is given to husband and wife, they do not take by moieties, yet if an estate be given to a man and a woman for life, in tail, or in fee, they then take by moieties. And even if they should afterwards marry, they will continue to hold by moieties after their marriage.

An Intail of a
Rent barred
by a Recovery.

§ 35. We have seen that a common recovery may be suffered of a rent-charge issuing out of lands, and if such a rent be granted in tail, with a remainder over, a recovery suffered by the tenant in tail will bar it.

Smith v.
Barnaby,
Carter 52.
Sid. 285.
Weeks v.
Peach.
Lut. 1224.

§ 36. Thus, where a person devised a rent of 50*l.* *per annum*, to be issuing out of lands to his son and his heirs; and if the said son should die without heirs male of his body, then he devised it over; the son suffered a recovery of this rent, and died without issue male. Lord Chief Justice *Bridgman*, and all the other judges were of opinion, that the recovery was good, and the remainder well barred; and this judgment was affirmed in the Court of King's Bench.

Chaplin v.
Chaplin,
3 P. Wms.
229.

§ 37. A distinction has however been adopted between a grant of a rent-charge in tail, with a remainder over of the same rent-charge in fee, and a grant of a rent-charge in tail, without any subsequent limitation of it in fee. In the first case the tenant in tail acquires an estate in fee simple in the rent-charge by means of the common recovery, but in the second

Tit. 28. c. 2.
R. §, 4.

he

he only acquires a base fee, determinable on his decease and failure of issue.

§ 38. A common recovery may be suffered with a single, double, or treble voucher; and if a recovery is suffered without any voucher, as if judgment is given upon default, confession, or *nient dedire* of the tenant, it does not bind the issue in tail, because they have no recompence, and are not estopped by their father's judgment, as they claim paramount the estoppel *per formam doni*, and therefore they may falsify such recovery.

Of Recoveries, with single and double Voucher.

§ 39. A recovery with single voucher, that is, where the *præcipe* is brought against the tenant in tail himself who immediately vouches over the common vouchee, is a good bar to the estate, whereof the tenant in tail is in possession at the time of the recovery; but is no bar to any other estate. A recovery, with double voucher, that is, where the tenant in tail is vouched and vouches over the common vouchee, is a good bar, not only to the estate whereof he is then in possession, but also to all other estates to which he has any right, although such estates be devested out of him and discontinued. A recovery, with treble voucher, is used to make a perpetual bar of the estate whereof the tenant to the *præcipe* was seised, and also of every estate of inheritance which has ever been in the first or second vouchee, or their ancestors; and also of all remainders and reversions depending on those estates, and all charges and incumbrances derived out of those remainders and reversions.

Vide Moor 256.
Bro. Recov. 19. 30.

§ 40. The

Pigot 109.

§ 40. The reason of the difference between a recovery with single, and a recovery with double voucher, is, that in a recovery with single voucher, where the *præcipe* is brought against the tenant in tail, who vouches over the common vouchee, if the tenant is not seised of the estate tail at the time, the issue in tail may, after the death of the ancestor, plead, *nient tenant tempore brevis nec unquam postea*, and by that means avoid the recovery; for the tenant in tail not being seised of the estate tail at the time of the recovery, the recompence in value can only go in lieu of the estate whereof he was then seised, and not in lieu of the estate tail; so that, as to the issue in tail, it only operates as a recovery on a false title which never bound them, because they could have no recompence in value. But where the tenant in tail comes in upon the voucher of the tenant to the *præcipe*, without demanding the lien, or counterpleading the warranty, he then comes in, in privity of all the estates he ever had, though the precedent estate, on which the voucher depends, is divested, discontinued, and turned to a right, and the recompence in value, which he has, or possibly may have, bars the issue.

Pigot 114.
3 Rep. 60.
Moor 634.
Owen 130.

§ 41. If a tenant in tail be disseised, or discontinues the estate tail, by fine or feoffment, and takes back an estate to himself, in fee or in tail, and then suffers a common recovery with single voucher, it will not bar the estate tail.

Ante.

§ 42. Thus, in *Taltarum's* case it was resolved, that the issue in tail was not barred the recovery of his ancestor,

ancestor, because the recovery was only with single voucher, and the tenant in tail was not actually seised of the estate tail at the time of the recovery.

§ 43. So if there be tenant for life, remainder in tail to another person, and a stranger disseises the tenant for life, and then enfeoffs the person in remainder, against whom a *præcipe* is brought, and he suffers a common recovery, this will not bind the remainder in tail, because the tenant in tail was not seised thereof at the time when the recovery was suffered, but had only a right thereto, and so the recompence in value could not extend to it.

Lincoln College Case,
3 Rep. 58.

§ 44. Where a woman, who was tenant for life, married the remainder-man in tail, and they joined in levying a fine, *par done, grant & render*, whereby the lands were rendered to the woman for life, with remainder to the husband and his heirs; afterwards the husband and wife suffered a common recovery, with single voucher, to the use of the husband and his heirs. It was resolved that this recovery was no bar, because the person who suffered the common recovery was not seised of the estate tail at the time, but of an estate in fee, which he had taken back by the fine; so that the recompence in value went to the new estate in fee, and not to the old estate tail.

Peck v.
Channel,
Cro. Eliz. 827.

§ 45. In the same manner, where tenant in tail, with remainder over, covenanted to stand seised to the use of himself and his heirs, until the marriage of his son, then to the use of himself for life, remainder to the

Freshwater v.
Rois,
Yelv. 51.

the use of his son and the heirs of his body, then suffered a common recovery with single voucher, and died without issue. It was adjudged that the recovery did not bar the remainder, expectant on the estate tail, because the covenant to stand seised had changed the estate tail into an estate in fee; so that the person who suffered the recovery was not seised of the estate tail at the time.

Fearn 42.
Powell v.
Price,
2 P. Wms.
536.

§ 46. Where a person is tenant for life, with an intervening estate of freehold to trustees for preserving contingent remainders to his sons and daughters, and an unexecuted remainder in tail to himself: a recovery with single voucher will not bar the remainders over.

Meredyth v.
Leslie,
6 Brown Parl.
Ca. 338.

§ 47. Thus, where *Charles Meredyth* being seised in fee of the lands in question, and having one son, *Henry*, by a former wife, previous to his marriage with his second wife *Judith Savage*, by articles in consideration of the then intended marriage, which soon after took effect, and of 1000 *l.* marriage portion, and of his natural affection for his son, *Henry*, covenanted to stand seised of the said premises, to the use of himself for life, and after his decease to the use of *Judith* for her life, and after her decease to the use of his son, *Henry*, for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *Henry* in tail male, remainder to his daughter in tail, *remainder to the heirs of the body of Henry*, remainder over. By indenture *tripartite*, between the said *Charles Meredyth*, and *Henry Meredyth*,

Meredyth, his eldest son, and heir apparent, of the first part; *Philip Savage*, and *Henry Luther*, of the second part, and *H. Wybrants*, of the third part. It was witnessed, that in performance of the said articles they the said *Charles* and *Henry* covenanted, that *Charles* and *Judith*, his wife, and *Henry*, would, before the end of *Michaelmas* term then next, levy a fine, and suffer a recovery of the lands comprized in the said articles, to the use of *Charles Meredyth* for life, and after his decease, then as to a certain part of the said lands to *Judith Meredyth* for life, for her jointure, remainder, after the death of *Charles* and *Judith*, to *Henry* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *Henry* in tail male, remainder to his daughters in tail, remainder to the heirs of the body of *Henry*, remainder over. After the death of *Charles Meredyth*, his son *Henry* entered upon the lands comprized in the articles and settlement, and suffered a recovery with single voucher, the writ of entry being brought against himself as tenant of the freehold who vouched over the common vouchee. One of the questions in this case was, Whether this recovery suffered by *Henry* barred the estate tail of *Henry*, and the remainders over? The House of Lords directed the Judges to deliver their opinion upon the following question:—*A.* tenant for life, remainder to trustees to
 “ preserve contingent remainders, remainder to his
 “ first and every other son in tail male, remainder to
 “ his daughters in tail general, remainder to the heirs
 “ of his body, with remainders over. *A.* suffers a
 “ recovery with single voucher, being himself tenant
 “ to

“ to the writ. Whether this recovery is good to bar
 “ the remainders expectant upon the estate tail
 “ of *A*?” Whereupon the Lord Chief Justice of the
 Court of Common Pleas having conferred with the
 Judges present, delivered their unanimous opinion,
 That the recovery with single voucher did not bar the
 remainders over. And the House of Lords decreed
 accordingly.

In the preceding cases, if the recoveries had been
 suffered with double voucher, they would have been a
 good bar; because, as the tenant in tail would then
 have come in upon the voucher, he would have been
 barred of all the estates and interests which were ever
 in him.

Ante.

§ 48. We have before seen, that where an estate is
 given to husband and wife as joint tenants, with a
 remainder to the husband in tail, a recovery suffered
 by the husband alone, will not bar his remainder in
 tail, because there being no moieties between husband
 and wife, the husband is not seised of the estate tail
 during the life of his wife.

§ 49. But if, in a case of this kind, the husband
 suffers a recovery with double voucher, it will be a
 good bar of the husband's estate tail, because when
 he comes in as a vouchee, he comes in of all the
 estates which are in him.

Cuppelike's
 Case,
 3 Rep. 5.

§ 50. Thus, where *A.* and his wife were seised of
 the manor of *B.* to them and the heirs male of the
 body

body of the said *A.* The husband levied a fine, and a writ of entry was brought against the cognizee of the fine, who vouched the husband, and he vouched over the common vouchee, and judgment was given in the usual manner. The question was, Whether the remainder was well barred by this recovery, the wife not being vouched? And it was resolved, that the recovery should bar the remainder; for although the husband alone was vouched, and not his wife, who had a joint estate with him, yet the husband coming in as vouchee, the recovery barred all the estates which were ever in him.

§ 51. So where *A.* was seised of a manor to him and his wife, and to the heirs male of the body of the husband. *A.* bargained and sold the manor to a stranger, who suffered a common recovery, in which *A.* was vouched, who vouched over the common vouchee. It was adjudged, that although *A.* alone was vouched, and not his wife, yet that the estate tail was barred, for the reasons given in the last case.

Fitzwilliam's Case,
6 Rep. 32.

§ 52. In the same manner, where *A.* who was seised in fee of the lands in question, upon the marriage of his son *D.* covenanted to stand seised, to the use of himself for life, remainder to the said *D.* and his wife, and the heirs male of their bodies, remainder to *D.* and the heirs male of his body, with several remainders over. *A.* died, and *D.* suffered a common recovery with double voucher, in which he alone was vouched, and vouched over the common vouchee:

Hallet v. Saunders,
2 Lev. 107.

the wife died, and afterwards *D.* died without issue. It was agreed, 1st, That this settlement being made before marriage, when the husband and wife took by moieties, and not by intireties, the husband had an absolute power over his own moiety, and therefore, as to the husband's moiety, the recovery was a good bar: in which this case differs from that of *Owen v. Morgan*, where the settlement being made after the marriage, the husband and wife took by intireties. 2dly, That this recovery was no bar to the moiety of the wife, because she was not vouched. 3dly, That the estate tail, which was limited to *D.* and his wife and the heirs male of their bodies, being determined, the remainder to *D.* in tail male general, and all the other remainders depending thereon, were absolutely barred by the recovery; for when *D.* was vouched, and vouched over, he came in of all the estates he had, and consequently the remainder in tail male to himself, and all the remainders depending on it, were well barred.

Moody v.
Moody,
Amb. R. 649.

§ 53. *Edward Moody* tenant in tail under his father's will, with a contingent remainder in fee to himself, being about to marry, in 1709 conveyed, by way of immediate use, to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himself and his wife in fee; *Edward Moody* afterwards made his will and devised part of his estate, of which he had suffered a recovery, to his younger son, after the death of his wife. The wife died, and the eldest son set up a title to the estate. The bill was brought by the

younger son. It was argued for the plaintiff, that the conveyance being before marriage, the husband and wife were intitled in moieties, and in that respect differed from the case of a conveyance to husband and wife after the marriage; and that the recovery in which only the husband was vouched barred a moiety of the estate. This was said to be doubted in *Cuppledike's* Ante. case, but was settled in *Hallet* and *Saunders*.—It was argued for the defendant, 1st, that there being a covenant in the settlement to do all further acts by fine, recovery, &c. The recovery suffered by *Edward Moody* was to be considered as an act done, not in destruction but in confirmation of the settlement. 2d, That the husband and wife were seised of an entire estate which, according to Lord *Coke*, is inseparable, and therefore the recovery in which the husband alone was vouched, was void *in toto*. In reply it was said as to the first question, that *Edward Moody* being seised of two estates tail, the recovery barred both, and as to the second, the distinction was relied on between a joint estate given to the husband and wife before marriage, and a joint estate given to them after marriage; the former is severable, the latter not.—Lord *Camden*, Chancellor, after taking time from the 24th *January* to the 30th *May*, for consideration, gave his opinion, First, That the recovery was a confirmation of the settlement and not a destruction of it, being to be considered as a bar of the old intail only. This was a slight question and deserved little notice; where tenant in tail is vouched, he comes in of every estate he has; if it had been his intention only to have barred the old intail, he would have

declared so. 2d, Question, which is the only one that deserves serious consideration, is as to the operation of the recovery. In general a fine or recovery by one joint-tenant only severs the joint-tenancy, and operates on a moiety. *Co. Lit.* 187. makes the distinction between a joint estate given to the husband and wife during the marriage, and a joint estate to them before marriage. In the former case their interest is not severable, in the latter case they take in moieties. The doubt in *Cuppledike's* case arose on a joint estate during marriage; and 1 *Leon.* 270, is mistaken as to Lord Coke's doubt, for the case of a joint estate before marriage is not mentioned in *Cuppledike's* case. The question seems to have been determined in *Simmond's* case, *Moore* 92; the only doubt is, whether the husband and wife can hold moieties; and in that case all the Judges held, there were several estates tail between husband and wife. It follows that the recovery in this case is a severance of the joint estate, and passes a moiety.

Ante. f. 17.

§ 54. We have seen that where a tenant in tail levies a fine and dies, leaving issue, it is a doubtful point whether such issue, by being vouched in a common recovery could bar the remainders, &c. depending upon such estate tail. But if it is admitted, that where a person is vouched, and vouches over, he comes in of all the estates and rights which are in him, it will follow that in a case of this kind the remainders may be barred by a common recovery, in which the issue of tenant in tail comes in upon the voucher.

§ 55. A com-

§ 55. A common recovery duly suffered is not only a good bar to an estate tail, but is also a bar to all remainders and reversions depending on the estate tail, of which a common recovery is suffered, and to all charges and incumbrances created by the persons in remainder and reversion.

Effect of Recoveries in barring Remainders and Reversions.

§ 56. Thus, where *William Capel*, being tenant in tail, remainder in tail to *Richard Capel*, *Richard Capel* granted a rent-charge of 50 *l. per annum* to his son; afterwards *William Capel* levied a fine of his estate tail to two persons, against whom a *præcipe* was brought, who vouched *William Capel*, and he vouched over the common vouchee, by which means a recovery was suffered of the lands. *William Capel* died without issue, and the question was, Whether this rent-charge, granted by the remainder-man, was barred by the recovery? It was resolved by all the Judges, in the Exchequer Chamber, That this rent-charge was well barred, and that a common recovery, duly suffered by a tenant in tail, should not only bind the remainder, and all leases, charges, and incumbrances, granted or made by the person in remainder, but also the reversion, and all leases, charges, and incumbrances, granted or made by the person in reversion; and that there was no difference between a reversion and a remainder, expectant upon an estate tail, in that respect.

Capel's Case,
1 Rep 62.

§ 57. So where *A.* was tenant in tail, remainder to *B.* in fee. *B.* granted his remainder to a stranger for life, with remainder to the Queen in fee, upon condi-

Cholmley's Case,
2 Rep. 52.

tion. *A.* the tenant in tail, suffered a common recovery; and the question was, Whether the recovery barred the estate for life, and the remainder upon condition to the Queen? It was resolved, that the recovery not only barred the estate tail of *A.* but also the estate for life in remainder, and that the remainder in fee limited to the Queen was void.

Hudson v.
Benfon and
Baron,
2 Lev. 28.
Sir T. Ray.
236.

§ 58. *Rowland Morley* being seised in fee made a feoffment to the use of himself, and the heirs male of his body, remainder in tail to several other persons, with a proviso, that if *Rowland* and *Edward* his son, and *Lady Elizabeth Morley* should happen to die, and there should be no issue male of *Rowland*, that then *Ann Morley* should have a rent-charge out of those lands of 200 *l.* a year, until she received the sum of 2000 *l.* *Edward Morley*, the last issue male of *Rowland Morley*, made a lease for 1000 years, and afterwards levied a fine and suffered a recovery, and died without issue. The question was, Whether the rent-charge of 200 *l.* a year, limited to *Ann Morley*, was barred by this recovery? It was argued, that the rent-charge was only a contingent use, which was not *in esse* when the recovery was suffered: so that the recompence in value could never extend to it, and therefore that it ought not to be barred. As to *Capel's* case it was observed, that the rent was barred, because it issued out of the remainder in tail, which was barred by the recovery. But it was resolved, that the rent-charge was barred by the recovery, because all the estates charged with the rent were barred; and that *Capel's* case ruled the present case; for in that case

case all the objections were made which arose in the present case. And Sir *Matthew Hale* observed, that about the 9 *Eliz.* it was doubted whether, if a remainder for years were limited after an estate tail, it could be barred by a recovery suffered of the estate tail; because the lease for years being only a chattel, no recompence in value could go to it; but it was now universally allowed, that such a lease was barred by a recovery.

§ 59. Thus, if lands be limited to *A.* for life, remainder to his first and other sons in tail, and, for want of such issue, to trustees for 500 years; the tenant in tail in possession may bar this remainder for years by a common recovery. 3 Keb. 488.

§ 60. A gift was made in tail, determinable on the donor's payment of 1000 *l.* with a remainder over: before the day of payment, the tenant in tail suffered a common recovery, and it was adjudged, that the right of the donor to the 1000 *l.* and also the remainder over, were well barred. 1 Mod. 111.
1 Keb. 31.
3 Keb. 291.

§ 61. The power of suffering a common recovery is one of those privileges which is so inseparably annexed to an estate tail, that it cannot be restrained by any condition, limitation, proviso, or covenant whatsoever. The Power of suffering a Recovery cannot be restrained. - 1 Inst. 223 b.
n. 1.
6 Rep. 41 a.

§ 62. Thus, where *C. Corbet* covenanted to stand seized of lands to the use of himself for life, remainder to the use of *R.* and the heirs male of his body, Corbet's Case 2
1 Rep. 83
Mildmay's Case,
6 Rep. 40.
G g 3 with

with divers remainders over. Provided that if R. or any of the heirs male of his body should attempt or procure any act, or thing, by which any estate tail so limited, should be undone, barred, or determined, that then the uses and estates to him limited, who should so do, &c. should cease, only in respect to such person so attempting, in the same manner as if such person so attempting, &c. were naturally dead; and that then immediately in all such cases, the uses of such lands should be to such persons for such and the like estate, and in the same manner and form, and with such remainders over, and under such limitations and restrictions, &c. as if such persons so attempting, &c. were naturally dead. Afterwards *Corbet* died, and R. the first tenant in tail suffered a common recovery to his own use. The person next in remainder entered: and upon the question, whether such entry was lawful or not? the Court of Common Pleas unanimously agreed, that this *proviso* to cease an estate limited to one, and the heirs male of his body, *as if the tenant in tail were dead*, was repugnant, impossible, and against law. For the death of tenant in tail, was not a cesser of the estate tail, but the death of tenant in tail, without issue of his body, was the determination thereof.

Mary Por-
tington's
Case,
10 Rep. 37.

§ 63. So where lands were devised to several daughters successively in tail, with a *proviso*, that if any of them should conclude and agree to or for the doing or execution of any act, &c. whereby the lands intailed, &c. or any estate or remainder thereof should by any way or means, be discontinued or aliened, or should

should do any act or thing whereby the lands might not descend, remain, or come, as limited by the will, that then the person so concluding and agreeing to or for the doing and execution of any such act, &c. should immediately after such conclusion and agreement, &c. lose and forfeit such estate and benefit as she and they might claim, in such manner as if she or they had never been named in the will, and thenceforth the estate and estates limited to her or them should utterly cease, as fully to all intents and purposes as if she or they were *dead, without heirs of their bodies*. The first tenant in tail concluded, and agreed to suffer a common recovery, and suffered one accordingly; the next in remainder claimed the estate as forfeited; and contended, that if the donor could not restrain the recovery after it was suffered, because thereby the remainder was barred, yet he might restrain the conclusion and agreement to suffer it, to prevent the bar by the recovery. But it was adjudged, that tenant in tail cannot be restrained by any condition or limitation from suffering a recovery; and that it was absurd to say that the recovery itself cannot be prohibited by any condition or limitation; and yet that the conclusion or agreement to suffer it may be prohibited; and it was also laid down in the arguments in the same case, that the levying a fine within statute 4 *Hen. 7. c. 24.* and 32 *Hen. 8. c. 36.* to bar the issue, was of the number of those incidents to an estate tail, which could not be restrained by condition.

§ 64. But although a condition, that tenant in tail shall not suffer a common recovery, is void, yet it has

been determined, that a covenant, not to suffer a common recovery; will bind the assets of the covenantor.

Collins v.
Plummer,
1 P. Wms.
104.
2 Vern. 635.]

§ 65. Thus, where a person, in consideration of marriage, settled lands upon himself for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and covenanted with the trustees, that he would not suffer any recovery to bar the limitations in the settlement. The husband suffered a recovery of these lands to the use of himself and his heirs. The Lord Chancellor was of opinion, that the covenant did not bind the land so as to defeat the recovery. But it being pressed, that they might be at liberty to sue the executor, and recover out of the personal assets, an issue was directed to try what the wife and the issue of the marriage were damnified by the breach of this covenant.

Vide 2 Vernon 233. 254.

King v.
Burchell,
Amb. 379.

Earl of Suffolk v. Howard,
2 P. Wms.
177.
Bettison v. Farrington,
3 P. Wms.
363.

§ 66. Where an heir in tail is disinherited by a common recovery, and seeks for relief in a court of equity, the recovery, together with the deeds for making a tenant to the *præcipe*, will be directed to be brought before a Master, that the person thus barred may have an opportunity of inspecting them, and of seeing whether any thing can be discovered for his advantage.

TITLE XXXVI.

RECOVERY.

CHAP. XI.

Of the Force and Effect of a Recovery in barring other Estates and Interests.§ 2. *Dower, &c.*7. *Trust Estates.*12. *What Possession necessary.*18. *Powers Appendant or in Gross.*§ 22. *Conditions Collateral.*28. *Contingent Remainders.*31. *Writ of Error.*

Section 1.

A COMMON recovery differs very much in its operation from a fine, for it has not the power of establishing an undoubted title after a certain number of years. A fine was originally adopted, as a public and solemn mode of alienation; and its effect in barring intails, arose in consequence of a positive law, made some centuries afterwards. A recovery was first generally introduced for the purpose of barring intails only, and, therefore, it has not, in some respects, so extensive and powerful an effect as a fine. But in consequence of the principle, that where a common recovery is suffered, the recoveror thereby acquires a new estate in fee-simple, it has been determined, that a recovery is a good bar to several other estates and interests in land, besides estates tail.

§ 2. By

Dower, &c.
2 Inst. 347.

§ 2. By the common law, where a husband being impleaded, had given up the land demanded to his adversary *de pleno*, that is, by a regular judicial surrender, the justices, upon a writ of dower brought by the wife, would adjudge the wife her dower. But, where the land was lost by default, there was a difference of opinion; some justices holding that the widow was, in such a case, entitled to dower, others, that she was not. To remove this ambiguity, it was declared by the statute of *Westminster* 2. c. 4. that a woman claiming her dower, should be heard in this case as in the former; and if it was objected to her, that her husband lost the land by judgment, so that she ought not to have any dower, and upon enquiry it was found to be a judgment by default, then that the tenant should further shew, what he had a right to according to the writ, which he had first brought against the husband; and if he proved the husband had no right, nor any one but himself, then that the judgment should be *quod tenens recedat quietus*, and *quod uxor nihil capiet de dote*; but if he could not shew that, then that the woman should have judgment *quod recuperet dotem suam*.

2 Rep. 74 a.
10—43 a.
Pigot 66.

§ 3. It follows, from these principles, that a common recovery suffered by a husband alone, will not bar his wife of dower, but if the wife joins in such recovery, it will be a good bar to her claim of dower out of the lands comprised in the recovery, although she can have no recompence in value, and the wife shall be supposed to have joined in such recovery, for the sole purpose of barring herself from claiming her dower.

§ 4. Thus, in the case of *Eare v. Snow*, it was agreed by all the Judges, that the wife was named in the *præcipe*, in order that she might be barred of her dower, for which purpose women were usually named in recoveries had against their husbands.

Ante ch. 10.
Vide Tit. 35.
ch. 10. f. 14.

§ 5. A woman may also bar herself of her jointure, by joining her husband in suffering a common recovery, in the same manner as if she had joined him in levying a fine, and for the same reasons.

§ 6. If a married woman, having the trust of a term in her, joins her husband in suffering a common recovery of the lands out of which the term is created, she will be thereby barred of all her claim to it, for she comes in by voucher, in privity of all her estate legal and equitable.

Incedon v.
Northcote,
3 Atk. 430.

§ 7. A common recovery suffered by a *cestui que trust* in tail, who is in possession under the trustees, will be sufficient to bar all remainders and reversions depending on such estate tail, although there be no legal tenant to the *præcipe*.

Trust Estates.

§ 8. Sir Francis North purchased certain lands in *Essex* from *Richard Allington*, who was *cestui que trust* in tail of them, with remainders over, and had suffered a common recovery; but there was no legal tenant to the *præcipe*, the freehold being in the trustees, who were not parties to the recovery. The question was, whether the remainders expectant on the estate tail were barred by this recovery. The decree was in these

North v.
Champer-
noon,
2 Chan. Ca.
63. 78.
1 Vern. 13;
1 P. Wms. 91.

words :

words : “ His Lordship, upon long debate of the matter, on hearing what was alleged by the counsel on either side, touching the same, declared that he was fully satisfied that the said recovery did sufficiently bar all remainders depending upon the estate tail of *Richard Allington* who suffered the same ; it being a general rule, that any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation upon a trust, as it should have had upon the estate in law, in case the trustees had executed their trust ; otherwise trustees, by refusing or not being able to execute their trust, might hinder the tenant in tail of that liberty, to dispose of his estate, and bar the remainders, which the law gives him as incident to his estate, which would be manifestly inconvenient, and tend to the introducing of perpetuities.”

Beverly v. Beverley,
2 Vern. 131.

Robinson v. Cumming,
Forrest. 167.
1 Atk. 43.

§ 9. Recoveries of this kind only operate on the trust estate whereof they are suffered, and the equitable remainders expectant thereon ; but do not affect any legal estate, so that the legal remainder cannot be barred by an equitable recovery.

Salvin v. Thornton,
cited
1 Brown's
Cases in
Chan. 73.
Amb. Rep.
545. 699.

§ 10. Thus, where *John Thornton* being seised of the premises for life, with remainder to his first son, *Thomas*, in tail male, remainder to his second son, *James*, in tail male, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners, was bought by *Thomas* (the tenant in tail) but in the name of a trustee. *Thomas*, thus having the equitable estate for the life of his father, and the legal estate

estate tail, suffered a recovery, and soon after died, leaving issue a daughter, wife to the plaintiff. *James*, the second son, took possession, suffered a recovery (after the death of his father and the trustee, in whom his estate vested) and died, leaving two daughters, the defendants, who were in possession. The bill was filed by *Salvin*, in right of his wife, for an account of profits, and to have the estate delivered up. Upon the hearing at the Rolls, his Honour ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that *Thomas's* estate for life being an equitable estate, and his estate tail a legal estate, did not enable him to suffer either a perfect legal or a perfect equitable recovery, and, therefore, the recovery suffered operated nothing.

Shapland v. Smith,
1 Brown's Ca.
in Chan. 75.

§ 11. It has been held, in a modern case, that where an estate is devised to a person in fee-simple, upon trust for several persons successively in tail, remainder in tail to the devisee in trust, such a remainder may be barred by an equitable recovery; for to create a merger of the equitable in the legal estate, by their union, both estates must be co-extensive and commensurate; and, therefore, that an equitable recovery would bar an equitable remainder in tail in the person who had the whole legal fee.

Brydges v. Brydges,
3 Vef. Jun.
120.

§ 12. In recoveries of this kind, there must be an equitable tenant to the *præcipe*, that is, the trust estate must be conveyed to a third person, against whom the

What Possession necessary.

writ

writ must be brought, in the same manner as in recoveries of legal estates.

Burnaby v.
Griffin,
3 Vef. Jun.
266.

§ 13. Where an estate was devised to trustees and their heirs, in trust to receive and pay over the rents and profits to a married woman for life, for her separate use, and, after her decease, to convey to her daughters as tenants in common in tail, with remainder, it was held, that the wife took an equitable estate for life, and that a conveyance from her and her husband, by lease and release, was sufficient to make a good equitable tenant to the *præcipe*.

2 Ch. Ca. 64.

§ 14. If there be a *cestui que trust* for life, before the *cestui que trust* in tail, so that, in case the legal estate had been conveyed according to the trusts, the tenant in tail could not bar the estate tail by a common recovery, there the *cestui que trust* in tail cannot bar his estate tail by a recovery.

Tit. 12. ch. 1.
f. 27.

§ 15. Where an estate is conveyed or devised to trustees and their heirs, upon trust to pay debts generally, or such debts as are specified, and after payment of such debts, or when such debts shall be paid, then in trust for *A. B.* or in trust to convey such parts of the estate as shall remain unfold to *A. B.* in either of those cases *A. B.* has a trust estate in the surplus vested in him immediately upon the execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate.

§ 16. This

§ 16. This point was lately investigated with great learning and ability in consequence of an objection that was made to the title of the Marquis of *Bath* to an estate upon the following case :

By a settlement previous to the marriage of Lord *Bath* (then Lord *Weymouth*) certain estates were conveyed to the use of Lord *Bath* for life, remainder to the intent that Lady *Bath* should receive a jointure, remainder for a term of years to raise portions for younger children, remainder to the first and other sons of the marriage. The estate thus settled being subject to several incumbrances, other estates were limited to trustees in fee, upon trust to stand seised thereof as a collateral security to protect the settled estates ; and, in order to discharge the said incumbrances, it was declared, that the trustees should, by mortgage or sale of the estates conveyed to them, raise such sums of money as should be necessary to pay off the incumbrances ; and it was agreed, that after all the incumbrances should be paid, and all the other trusts should be performed, the trustees should stand seised of so much of the said estates as should remain unfold, and of the equity of redemption of so much as should have been mortgaged, upon trust to settle and convey the same to Lord *Bath* for life, remainder to his first and other sons in tail male. No sale or mortgage was ever made by the trustees, nor were any of the incumbrances paid off until 1787, when Lord *Bath* and his eldest son joined in a recovery of the estates which had been conveyed to the trustees. The validity of this recovery was objected to, because it was suffered before the debts were paid,

Vide Collec-
tanea Juridi-
ca, vol. 1.
P. 214.

2 Atk. 578.
1 Vesey 144.

paid, and the objection was founded on a *dictum* of Lord *Hardwicke* in the case of *Bagshaw v. Spencer*, which was a devise to five persons and their heirs, in trust to pay debts, and then as to one moiety to the use of *Benjamin Bagshaw* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of *Benjamin Bagshaw*, remainder over. *Benjamin Bagshaw* suffered a recovery before the debts were paid, and a suit in Chancery being instituted to ascertain what estate *Benjamin Bagshaw* took by this devise, Lord *Hardwicke* said, that the devise to *Benjamin Bagshaw* was merely a trust in equity, for, as the first devise was to the trustees and their heirs, it carried the whole fee in point of law; that it could not be construed an executory devise of the legal estate, for, in that case, it would be too remote, being given after all debts should be paid, which might, in point of time, exceed a life or lives in being, or any other time allowed by law. After which, his Lordship is stated to have said these words: "That the recovery suffered was before the debts were paid, and, consequently, *Bagshaw* could not make a good tenant to the *præcipe* to support the recovery." Upon the authority of this passage, it was contended, that whether the limitation to Lord *Bath* was considered as a springing or shifting use at law, or a springing executory trust, it was not barred by the recovery suffered by Lord *Bath*, because, at the time of suffering the recovery, the event on which the limitation was to take effect, namely, the discharge of the debts, had not happened. On the other side, it was clearly laid down and proved by Sir *John Scott*, Mr. *Maddocks*, and Mr. *Fearne*, that the

the limitation to Lord *Bath* in the settlement, gave him an immediate vested interest in the surplus of the estate after payment of the debts; that in the case of *Bagshaw* and *Spencer*, both the Master of the Rolls and Lord *Hardwicke* agreed, that the devise to *Benjamin Bagshaw* was an interest actually vested in him. As to the idea of its being an executory devise of the legal estate, Lord *Hardwicke* said, if the will was to be construed in that manner, the devise would be too remote, being after payment of debts; but even admitting it to be a good executory devise of the legal estate to *Benjamin Bagshaw*, yet it did not vest in him, nor could his devisee claim it, *because the recovery was suffered before the debts were paid, and consequently whilst the fee was in the trustees, so that he could not make a good tenant to the præcipe.* The meaning of the expression of Lord *Hardwicke* so much relied on, was therefore no more than this—that a person to whom an executory devise of a legal estate is made cannot suffer a recovery until the event, on which the executory devise is directed to take effect, has happened.

It was admitted, that there was a strict analogy between executory devises and springing executory trusts, from which, it was concluded, that if a devise of an estate after payment of debts was not good as an executory devise, a limitation of the same kind in a deed would be void as a future executory trust; consequently, the trust created in Lord *Bath*'s settlement, to settle the estates after payment of the debts, would have been void as an executory use or trust, and the estate must have resulted to Lord *Bath* and his heirs

who was the original owner of the inheritance; from whence it followed, that any conveyance by Lord *Bath* would make a good equitable title, subject to the trust for payment of the debts. It was, lastly, said, that the payment of debts was not a condition precedent, which must be performed before a subsequent limitation or devise could take effect, but such subsequent limitation or devise was an interest commencing at the same time, and concurrent with the limitation or devise for payment of debts; and the words *after payment of debts*, or *when the debts shall be paid*, only denoted the order or course in which the several interests should take place in point of actual possession and perception of the profits, without preventing the subsequent estates, whether legal or equitable, from becoming vested in interest, at the same time with those which were prior to them in point of limitation.

Piggot v. Waller, 3 Vef. Jun. 98.

§ 17. It was determined in a modern case, that a trust estate passed by the deed to make a tenant to the *præcipe*, the words being sufficiently extensive for that purpose, although the tenant in tail did not apprehend at the time that the estate belonged to him; and that, as no adverse possession was shewn, the rightful owner must be presumed to have been in possession.

Powers Appendant, or in Gross.

§ 18. Where a person has a power appendant, or in gross, if he suffers a recovery of the lands, to which the power relates, it will bar and destroy it, because the lands are supposed to have been recovered by a right which is paramount to that of the person who

created the power, and which therefore over-reaches it.

§ 19. Thus, where lands were devised to *Bernard Melling* for life, and, after his death, to the issue of his body by a second wife (he having at the time of the devise another wife), and for default of such issue, to *John Melling*, provided that *Bernard* might settle a jointure on his second wife. *Bernard Melling* entered on the death of the devisor, and, during the life of his first wife, suffered a common recovery, to the use of himself and his heirs.

King v. Mel-
ling, 2 Lev.
58.
1 Vent. 225.

It was agreed, in the Exchequer-chamber, by all the judges, 1st, That *Bernard Melling* took an estate tail by the devise; and, 2d, That the power to make a jointure was destroyed by the recovery.

§ 20. A settlement was made of lands to the use of *A.* for ninety-nine years, if he should so long live, remainder to trustees during the life of *A.* to preserve contingent remainders, remainder over, with a power to *A.* to charge the lands with divers sums of money. *A.*, the trustees, and the remainder-man in tail, joined in suffering a common recovery, and declaring new uses thereof, viz. to the use of *A.* for life, with remainder over. It was determined, that the joining of *A.* in making the new settlement, without reserving a power to charge the premises with the said money, had destroyed that power which *A.* had of charging; for the contrary construction would enable him to defeat his own grant.

Saville v.
Blackett,
1 P. Wms.
777.

Tit. 35.
ch. 10. f. 54.

§ 21. Powers collateral to the land are not barred by a common recovery, for the same reason that they are not barred by a fine.

Conditions
Collateral.
Fearn 310.

§ 22. A common recovery suffered by a tenant in tail, bars all collateral conditions which are to take place on the determination of such estate tail.

Page v.
Hayward,
Pigot 176.

§ 23. Thus, where *Nicholas Searle* devised lands to his niece *Mary Bryant*, and the heirs-male of her body, upon condition, and provided she intermarried, and had issue male by a person surnamed *Searle*, and, in default of both these conditions, he devised the lands to *Elizabeth* in the same manner. *Mary Bryant* married one *Cliff*, and with him levied a fine, and suffered a recovery of the lands in which she and her husband were vouched. It was adjudged by the whole court; 1st, That the estate devised to *Mary* was a good estate in special tail; that is, to her and the heirs-male of her body begotten by a *Searle*; 2d, That the words upon condition, &c. though express words of condition, should be taken to be words of limitation; 3d, That the estate tail of *Mary* did not cease by marrying a person whose name was not *Searle*, because she might possibly survive her first husband, and afterwards marry a person of the name of *Searle*; 4th, That if the estate had been devised to *Mary*, and the heirs-male of her body, by a *Searle* to be begotten, provided, and upon condition, that if she married any other person but a *Searle*, the estate should go over, a common recovery suffered before marriage would bar the estate tail and remainders; and the court took a difference between a collateral

collateral condition; and a condition that runs with the land; for if a donor reserves a rent with a condition to re-enter, a recovery will not bar it; *aliter*, if the condition be to re-enter for non payment of a sum in gross.

1 Mod. 108.
111.
2 Lev. 28.

§ 24. So, where lands were devised to several persons successively in tail, and a clause was inserted by the testator, that whenever the estates devised should come to any of the persons therein named, they should take upon them the name of *W.* only. The first person to whom the lands were devised in tail, suffered a common recovery of the estate tail, in which he was vouched, and vouched over, and never took the name of *W.*; the person who was next in remainder, entered for a breach of the *proviso*, on account of the first devisee's not having changed his name. It was agreed by the whole court, that if this *proviso* were considered as a condition, it was collateral and subsequent, and was therefore well barred by the recovery.

Gulliver v.
Ashby,
4 Burr. 1929.

Amb. Rep:
328.

§ 25. *Devereux Edgar* being seised of the premises in question, devised them as follows: "I give and bequeath unto my daughter *Temperance Edgar*, all that my farm or estate called the *Breed Farm*, &c. to hold the same from and after the death of my wife, to the said *Temperance* my daughter, and to the heirs of her body lawfully begotten; and for want of such heirs, to my right heirs for ever. *Item*, I give and bequeath unto my daughter *Mary Edgar* all that my farm, &c. to have and to hold to the said *Mary*, and to the heirs of her body law-

Driver ex
dem. Edgar
v. Edgar,
Cowper 379.

“ fully to be begotten ; and herein my mind and will
 “ is further declared, that in case either of my said
 “ daughters *Temperance* or *Mary* shall happen to die,
 “ or depart this life, single, married, or widows, not
 “ leaving children or child living at their decease le-
 “ gally begotten, that then her gift, legacy, or bequest
 “ herein, or estate given her by this my will, shall be
 “ entirely void as to inheritance of heirs, and of none
 “ effect ; and the estate so given her, so dying without
 “ heirs of her body, shall descend and go to my heir
 “ male and his heirs male.” *Mary Edgar* suffered a
 recovery of the premises in question, to the use of
 herself in fee, and afterwards died unmarried. The
 question was, Whether the recovery suffered by *Mary*
Edgar barred the limitation over? Lord *Mansfield*
 said, the validity of the recovery suffered by *Mary*
 depended upon whether she was tenant in tail, or tenant
 for life of the estate thus devised to her. Now the estate
 was given to her and the *heirs of her body*, which was an
 estate tail; nevertheless, the intention of the testator might
 restrain that estate of inheritance, and confine it to an
 estate for life only; and, although it was insisted, that the
 testator had restrained the estate of inheritance during
 her life, yet he had only restrained it upon future con-
 tingencies, the first of which was the event of her own
 death ; but, until that contingency happened, the in-
 heritance was in her. The second was upon her leav-
 ing no children. It was manifest that the intention of
 the testator was, to prevent a common recovery being
 suffered ; but where a testator intends that which by
 law he cannot do, the law will not allow his intention
 to take effect. If, therefore, *Mary Edgar* was tenant
 in

in tail to the hour of her death, nothing was so clear, as that all conditions limited upon such an estate tail, were avoided by the common recovery which had been suffered; and the court were of opinion, that *Mary* took an estate tail by the devise.

§ 26. Although a common recovery suffered by a tenant in tail bars all collateral conditions subsequent, and limitations over; yet a common recovery has this operation only when suffered by a tenant in tail; for a recovery suffered by a tenant in fee-simple will not bar an executory estate, conditional limitation, or collateral condition, as will be shewn in a subsequent chapter.

*Fearne Ex
Dev. 67 n.*

§ 27. If a gift in tail be made, rendering a rent, and the tenant in tail suffers a recovery, it will not bar the rent, which will still remain as a collateral charge on the land distrainable of common right; for since the tenant in tail took the land subject to that charge by the original donation, the recoveror who claims under him can only have the estate in the same manner as he who suffered the recovery had it. But if there had been a condition of re-entry, on the non-payment of the rent, it would have been destroyed.

*Whyte v.
West. Cro.
Eliz. 792.
2 Lev. 30.
1 Mod. 109.
Pigot 139.*

§ 28. A common recovery bars all contingent remainders depending on the estate whereof the recovery is suffered, because the recovery destroys the particular estate on which the contingent remainders depend.

*Contingent
Remainders.
Tit. 16. c. 6.
f. 5.*

Plunkett v.
Holmes,
1 Lev. 11.
Sir T. Ray. 28
Gilb. Uses
133

§ 29. Thus, where a person devised lands to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if *Thomas* had issue living at the time of his death, that then the fee should remain to the right heirs of *Thomas* for ever. *Thomas* entered upon the death of his father, and suffered a common recovery, and afterwards died without issue. It was resolved, that *Thomas* was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was destroyed by the recovery.

Loddington
v. Kime,
1 L. Raym.
203.
Salk. 243.
3 Lev. 431.
Ferne 282.

§ 30. So where lands were devised to *A.* for life, without impeachment of waste; and, in case he should have any issue male, then to such issue male, and his heirs for ever; and if he should die without issue male, then to *B.* and his heirs for ever. *A.* entered, suffered a common recovery, and died without issue; and it was held, that the remainders over being contingent, were barred by the recovery. Another case arose on this will, in which the same point was determined by the House of Lords. And in the cases of *Doe ex dem. Brown v. Holm*, 3 *Wilson's Reports* 237. *Goodright v. Dunham*, *Douglas* 264. and *Goodright v. Billington*, *id.* 753. this doctrine is confirmed.

Carter v.
Barnadiston,
1 P. W. 505.

Writ of
Error.

§ 31. A common recovery suffered after an erroneous fine, will bar the issue in tail from bringing a writ of error to reverse the fine; and even an erroneous recovery will bar a writ of error to reverse a fine until the recovery is reversed, because a common recovery

with voucher, bars every kind of right which the vouchee or his heirs can have to the land ; but a void recovery is no bar.

§ 32. Thus, where *R. Barton*, being tenant in tail, levied an erroneous fine, and afterwards a writ of entry was brought against the cognizee, who appeared and vouched over *R. Barton*, and he vouched over the common vouchee. After the death of *R. Barton*, the issue in tail brought a writ of error to reverse the fine, to which the recovery was pleaded in bar. And it was resolved, that when tenant in tail levies an erroneous fine, he hath yet a right to the land, which, by his entry into the warranty, and recovering thereby an intended recompence in value, is barred. For although tenant in tail cannot by deed release errors to bar the issue in tail, yet as by fine or recovery he may bar the estate tail itself, so may he bar the writ of error ; and when he enters into the warranty and vouches over, and hath recompence, he is in by his warranty of all estates, and the recompence in value is a sufficient bar to all estates and rights which he had in him.

*Barton v.
Lever, Cro.
Eliz. 388.*

TITLE XXXVI.

RECOVERY.

CHAP. XII.

Of some other Effects of a Recovery.

- | | |
|---|---|
| § 1. <i>Operates as a Forfeiture of an Estate for Life.</i> | 5. <i>In some Cases alters the Descent.</i> |
| 4. <i>Estoppel.</i> | 9. <i>Revokes a Devise.</i> |
| | 10. <i>Lets in prior Incumbrances.</i> |

Section 1.

Operates as a
Forfeiture of
an Estate for
Life.
Pelham's
Case,
1 Rep. 15.

1 Inst. 35 b.
252 a.

A Common Recovery suffered by a tenant for life, without the concurrence of the person in remainder or reversion, operates as a forfeiture of his estate for life, in the same Manner as if he had levied a fine, or made a feoffment in fee. This doctrine was deduced from the Common Law ; for if a demandant in a real action recovered against a tenant for life by default, or *nient dedire*, or by pleading covenantously, to the disherison of the person in reversion, the tenant for life forfeited his estate ; for he was entrusted with the freehold, and was to answer the *præcipes* of strangers, and defend his own, as well as the reversioner's estate ; so that when he gave way to the demandant's action, or vouched a stranger, he admitted the reversion to be in such demandant or stranger, and consequently denied the tenure of the reversioner, which was a forfeiture.

§ 2. If

§ 2. If a tenant for life has also an estate in remainder, he may then suffer a common recovery without incurring a forfeiture.

*Doe v. Lord
Mulgrave,*
5 Term
Rep. 320.

§ 3. One *Richards* being tenant for life, with remainder to his first and other sons in tail, remainder to the heirs of his body. *Richards* conveyed his estate by lease and release to a third person to make him tenant to the *præcipe*, and suffered a recovery. The question was, whether this recovery operated as a forfeiture. The court was of opinion that the recovery did not operate as a forfeiture. That the passage in 1 *Inft.* 35 *b.* could only be understood of a bare tenant for life who took upon himself to do an act inconsistent with the nature of his estate, and which before the statute of 14 *Eliz.* would have displaced the remainders. The forfeiture of his estate was therefore a proper punishment upon him for attempting to do an act inconsistent with his tenure, and calculated to injure the person in reversion. But the law will never punish a man for doing that which is not inconsistent with the nature of his estate, and which may have a legal operation. Such was this case, for *Richards* stood in two several characters, that of tenant for life, with a remainder in tail subsequent to that limited to his first and other sons. This remainder in tail was all that he sought to bar, and the law says that having the immediate freehold, and an estate tail in remainder in him, he has a right to bar it. The next thing then was, whether the recovery itself would operate so as to subject him to a forfeiture, and as to this the court were unanimously of opinion that it did not, because there was a legal subject for it to work upon, namely, his remainder in tail.

*Smith v.
Clifford,*
1 Term Rep.
738.

Ante c. 8.
f. 20.

tail. *Richards* was vouched and entered into the warranty, not in respect of his tenancy for life, but of his remainder in tail; and the recompence in value is supposed to go to those who would have been intitled to *his* estate tail and those who stood subsequent to them, and passed over his first and other sons, who had the first estate tail in them; and as they received no recompence, their estate was not displaced or in any manner affected by the recovery.

Vide ante
Meredith v.
Leslie, S. P.
ch. 10. f. 47.

Estoppel.
Pigot 123.

Ante ch. 3.
f. 46.

10 Mod. 45.

§ 4. The judgment in a common recovery being of equal force with a judgment obtained in an adversary suit, will operate as an estoppel against all those who are parties to it, and conclude them from averring any thing against it. But a common recovery, when suffered of an estate tail, will not operate as an estoppel against the issue in tail, the remainder-men, or reversioner.

In some Cases
alters the
Descent.
Tit. 29. ch. 3.
f. 43.

§ 5. If a tenant in tail by purchase, under a marriage-settlement made by his ancestor *ex parte materna*, with the reversion in fee by descent *ex parte materna*, suffers a common recovery to the use of himself in fee, this estate will descend to his heirs *ex parte paterna*.

Martin ex
dem.
Tregonwell
v. Strachan,
1 Stra. 1179.
1 Will. Rep.
66.
5 Term Rep.
107. note.
Willes R.

§ 6. Thus, where *John Tregonwell*, being seised in fee of the lands in question, upon the marriage of *Mary* his eldest daughter with *Francis Luttrell*, by indenture executed in the year 1680, covenanted to levy a fine, and suffer a recovery to the use of himself for life, remainder to *Francis Luttrell* for life, remain-

der

der to his daughter *Mary* for life, remainder to the first and other sons of the said *Mary* by the said *Francis Luttrell*, remainder to the first and other sons of the said *Mary* by any other husband, with remainder to his own right heirs in fee. A fine was levied, and a recovery suffered, to the uses of this indenture.

On the death of *Francis Luttrell*, without issue male, the said *Mary* married Sir *Jacob Banks*, and had issue by him a son named *Jacob*, who, on the death of his father and mother became seised of an estate tail, in the said premises, and of the reversion in fee, *ex parte materna*, and in the year 1725, suffered a common recovery in the usual form, having by a deed of bargain and sale inrolled, made a tenant to the *præcipe*, and declared by the same deed, that such recovery should be and enure to the use of himself and his heirs, and died without issue. Upon the death of *Jacob Banks*, *John Strachan* entered into the lands in question, as heir *ex parte paterna*, and *Thomas Tregonwell* brought an ejectment against him, claiming those lands as heir to the said *Jacob Banks*, *ex parte materna*. The question was, whether this recovery did or did not operate as a new purchase, and thereby alter the descent? The Court of King's Bench was of opinion that this recovery altered the nature of the estate, and made it descendible to the heirs *ex parte paterna*.

A writ of error was brought from this judgment in the House of Lords, and on behalf of the plaintiff in error, who claimed *ex parte materna*, it was argued, that

6 Brown Parl.
Ca. 319.

that the rule of law is clear, that the estate of one dying seised by descent *ex parte materna*, can descend to none but the heir *ex parte materna*, it being founded on natural justice, that an estate should go to the blood and family from whence it came, and where the owner himself has not thought fit to give it away from them : that this estate was originally the inheritance of *Jacob Banks's* mother and her ancestors ; and therefore, if there had been no interruption in the course of descent, it must now descend to the plaintiff : that the only interruptions insisted on were the settlement of 1680, and the recovery and deed of uses in 1725. As to the former it was only a temporary interruption of the possession, by the particular or partial estates carved out of the fee, the inheritance being still left to descend, *ex parte materna* ; and whenever those particular estates should determine, whether by the death of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again : and as to the latter, the recovery and deed of uses only determined, and barred the particular estates, and consequently let the fee into possession, in the same condition and quality as when in reversion, and therefore could not alter the nature of the ancient use, or the descendible quality of it : that this is clearly the case where a fine is levied by tenant in tail, who has the reversion in fee in himself, it having been settled, that such a fine extinguishes the estate tail, and lets the old reversion into possession ; nor is there any material difference between a fine and a recovery ; for, so far as their respective powers reach, they are both universally held to be bars of the

the particular estates and conveyances of their own inheritance in fee. It is objected, that a recovery not only bars the estate tail but the remainders also. But that distinction is totally immaterial, because it affects only the extent of the bar or extinguishment, not the manner in which those instruments operate; it proves the recovery to be a bar or extinguishment of the estates tail, both in possession and remainder, but does not prove it to be less a bar or extinguishment of either; and the bar or extinguishment of both, by the recovery, as much lets in the reversion in fee after both, as a bar or extinguishment, by fine of one, lets in the reversion in fee dependant on that one only: that this distinction could not be applicable to the case of a recovery by tenant in tail, with an immediate reversion in fee to himself; and it would be extremely difficult to maintain, that in such a case the use would be the old one, and go *ex parte materna*; but that in the present case, it was a new one, only, because there was an intermediate remainder in tail, which was equally, and but equally, barred with the estate tail in possession; or if that should be admitted to be no material point of distinction, it would be as hard to maintain, that if tenant in tail, with reversion in fee in himself, descending *ex parte materna*, bars the estate tail by fine, the resulting or declared use in fee to himself, would be the ancient use, and go *ex parte materna*; but that if the same tenant in tail bars the same estate tail by a recovery, the resulting or declared use would be a new use, and go *ex parte paterna*: that it was apprehended no case could be cited to warrant this distinction; and if not, reason and equity pointed

pointed out that they ought both to have the same effect.

It is also objected, that a recovery is the proper conveyance of a tenant in tail, with remainder over, and therefore operates as a grant from him; and that the recoveror comes in under him, in the *per*, as his grantee, and therefore as a purchaser. But this would be, to make the recovery operate, not as a bar to the particular estates tail in possession and remainder, which is the sense and language of all the books, but as a bar to his own reversion in fee, which is absurd; nor indeed is a recovery, in any other sense, a grant from the tenant in tail, than as it is a common assurance, by which he may bar those particular estates, and acquire or convey the fee simple in possession: but it is not less such an acquisition, if he gets it by barring the particular intermediate estates, and letting his own fee into possession, than if it could be said to be a grant of the estate tail itself to himself in fee. But whatever might be the case, where the estate tail in possession, together with the remainder or reversion in others, include the whole inheritance, yet where the tenant in tail in possession has also the reversion in fee, the recovery operates as a conveyance of the reversion, and a bar to the intermediate estates. A recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate tail alone; nor can the recoveror come more under the tenant in tail, or his estate, or be more properly a grantee from him of his estate tail, than the conusee of a fine is under the conusor; and yet, in this latter case, that notion clearly

clearly does not prevent the estate tail from merging in the fee. It is, however, further objected, that the estate tail is continued and enlarged by the recovery; but this is at best a very inaccurate manner of speaking, if not unintelligible or absurd, since an estate tail cannot continue longer than the issue *per formam doni*; and a fee simple cannot with any propriety be called an enlarged estate tail. The only reasonable sense of such expression, is, that the tenant in tail, by exercising the power which the law has given him, of barring the estates tail, has become possessed of the absolute fee in possession; but in this sense it is no otherwise an enlargement of his estate, than a surrender of the tenant for life to the remainder-man in fee, is an enlargement of the remainder-man's estate, and is therefore more properly an enlargement of the fee simple, by sinking the particular estate, than an enlargement of the particular estate, which is absolutely destroyed, nor does this manner of considering the recovery, in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate, because he acquires as much this way as the other, with this advantageous circumstance, that it keeps the estate in its natural channel, and prevents the act done for one purpose only, from enuring to another, which the party never thought of, and which, if he had, he might, and probably would have avoided.

In support of the judgment it was contended, that *Jacob Banks* being tenant in tail, under the settlement of 1680, by purchase, and not descent, the rule of

descent, relied on by the plaintiff in error, was only applicable where the person, whose estate is in question, was at the time of his death seised by descent, and no way affected or influenced the present question, if *Jacob Banks* acquired the fee by suffering a recovery, as tenant in tail by purchase: that a tenant in tail is considered in law as possible owner of the whole fee, viz. that the remainders and reversions are in his power by suffering a recovery, which is the act of tenant in tail, and takes its effect out of the estate tail, in right of which alone he is empowered to suffer such recovery, as he thereby acquires, in judgment of law, an absolute and pure fee against the remainder-men and reversioner, although the reversion were in a stranger; whereas, by a fine, the estate tail is only extinguished, and barred, as against the issue in tail; but, as to the remainder-men, or reversioner, it subsists, notwithstanding that act, as a base or determinable fee, on failure of issue: it was therefore apprehended, that by the recovery, which removed all restraints and limitations ensuing or dependent after the estate tail, the fee so acquired by *Jacob Banks*, proceeded out of the estate tail, and took its effect to the use of the person so enabled in law to suffer the same, as the result of his power, in virtue of the estate tail, which was gained by settlement (*i. e.*) by purchase, and consequently the remainders and reversions which subsisted before the recovery were alike extinguished, and put to an end, by force and operation of such recovery: that if the estate tail, as to the issue only, is considered as barred by a recovery, and the old estate in fee or reversion, subject to the estate tail,

tail, is let in, and takes place as contended for by the plaintiff, the consequence and inconvenience thereof would be, that in that case every estate in the kingdom, of which a recovery is suffered by a tenant in tail, seized also of the reversion in fee, would still remain liable as assets by descent to the specialty debts of the ancestor, from whom it descended (for the estate tail, while it subsists, and the base fee, gained by force of a fine, suspends the remedy, so long as there is issue, and therefore preserves the debts,) and this form of conveyance, invented and long used to strengthen the title of possessors who are tenants in tail, would be a means of destroying such intention, and would revive old demands to the ruin of many families.

After hearing counsel on the writ of error, the judges (who attended according to order) were directed to deliver their opinions on the following questions, *viz.* “Whether, upon the death of *Jacob Banks*, the estate in question did by law descend to his heir, on the part of the mother or not?” And the judges, having taken time to consider, the Lord Chief Justice of the Common Pleas delivered their reasons at large, and concluded with their opinions, “That the estate in question, upon the death of *Jacob Banks*, did not descend to his heirs on the part of the mother.” Whereupon it was ordered and adjudged, that the judgment given in the Court of King’s Bench should be affirmed.

Roe v.
Baldwin,
5 Term R.
104.

§ 7. The principle upon which this case was decided is, that by the recovery the estate tail was converted into an estate in fee; and as *Jacob Banks* took the estate tail as a purchaser, he must have taken the fee as a purchaser also, and consequently it descended to his heirs *ex parte paterna*; but in the case of an estate tail by descent, a recovery will not make it descendible to the heirs *ex parte paterna*, where it was before descendible to the heirs *ex parte materna*, and this doctrine extends as well to copyhold as to freehold estates.

Abbot v.
Burton,
11 Mod. 181.

§ 8. It follows from the same principle that a recovery suffered of an estate in fee simple will not alter the nature of the descent.

Revokes a
Devise,
Tit. 38. ch. 6.

§ 9. A common recovery operates as a revocation of a prior devise of the lands whereof the recovery is suffered, upon the same principle that a fine has that effect.

Lets in prior
Incum-
brances.

1 Rep. 62 a.
2 Rep. 52 b.
Pigot 120.
1 Willson's R.
277.
9 Rep. 10 b.

§ 10. A common recovery suffered by a tenant in tail, lets in all his preceding incumbrances, and renders valid all the acts of ownership which he has exercised over the estate tail. So that if a tenant in tail makes a lease not warranted by the statute 32 H. 8. or acknowledges a judgment or recognizance, and afterwards suffers a common recovery, it will operate as a confirmation of these charges which were before defeasible by the issue; for the recoveror acquires an estate in fee simple derived out of the estate tail, and therefore all those acts which bound the tenant in tail

will also bind the recoveror, who cannot aver that the person against whom he recovered had but an estate tail. It is therefore extremely dangerous for a tenant in tail, who has made leases, acknowledged judgments, or incumbered his estate tail in any other manner, to suffer a common recovery, because all those incumbrances will thereby become valid, and take place before any charge which is made on the lands after the recovery.

§ 11. Although a recovery be suffered for a particular purpose, yet it will confirm all prior incumbrances. Thus, in the case of *Goddard v. Complin*,¹ the following question was put: Tenant in tail mortgages for years, and afterwards, in consideration of marriage, suffers a recovery, for the purpose of settling a jointure on his wife. Whether this recovery should enure to make good the mortgage, it being only designed for establishing the marriage settlement? It was answered, that if there had been no recovery, there could have been no jointure, nor could the wife have avoided the mortgage, for she was in by the act of her husband, and no subsequent act of the husband could have avoided the mortgage. It was also said, that if a tenant in tail confesses a judgment, &c. and suffers a recovery to any collateral purpose, the recovery shall enure to make good all his precedent acts and incumbrances.

¹ Chan. Ca.
119.

§ 12. Where a tenant in tail makes any conveyance or settlement of his estate tail, which is not binding on his issue; if he afterwards suffers a common reco-

very, it will enure to make good the preceding conveyance or settlement.

Goodright
ex dem.

Tyrrell v.
Mead and
Shilson.

3 Burr. 1703.

§ 13. Thus, where a person, seised to him and the heirs male of his body, remainder to his own right heirs, by lease and release, previous to his marriage, conveyed his estate to trustees, to the use of himself for life, remainder to the use of his intended wife for life, remainder to his first and other sons in tail male; the marriage took effect, and they had issue a son: nineteen years afterwards the husband suffered a common recovery, and declared it to be to the use of *A.* *B.* and his heirs, in trust to sell the premises for the payment of his debts; *A. B.* sold the lands for the payment of the debts, according to the trust reposed in him; the tenant in tail died, and his son claimed the lands. The court were unanimously of opinion, that the recovery enured to the uses of the settlement, and therefore that the purchaser had no title.

Cheney v
Hall, Amb.
Rep. 526.

§ 14. *Gerard Walker* the father, by settlement on his marriage conveyed an estate to the use of himself for life, remainder to the first and other sons of the marriage in tail. In 1733 the son on his marriage conveyed part of the estate by lease and release to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs. In 1746 the father and son mortgaged the premises to *Henry Peach* for 1000 years to secure 300*l.* and suffered a common recovery, and declared the uses to the mortgagee and then to the father for life, remainder to the son in fee.

Lord

Lord *Hardwicke* was clearly of opinion that the recovery enured to the uses of the settlement of 1733.

§ 15. The principle that a common recovery shall operate as a confirmation of any preceding incumbrances created by the person who suffers such recovery, is founded in natural justice, which forbids men to defeat their own contracts. But where a tenant in tail, with the reversion in fee in himself, creates incumbrances, and his son (on whom the estate tail and reversion in fee descends) suffers a recovery, it will not, like a fine, operate so as to let the reversion into possession, and thereby make it liable to the debts of his father; because the operation of a recovery is to destroy all remainders and reversions expectant on the estate tail, and the fee acquired by the recoveror proceeds out of the estate tail. It follows, that where a person is tenant in tail by descent, with the reversion in fee in him also by descent, he ought never to bar his estate by fine only, but ought also to suffer a common recovery, which will effectually prevent the estate thus acquired from becoming liable to the debts or contracts of his ancestor.

Tit. 35. c. 12.
s. 6.

TITLE XXXVI.

RECOVERY.

CHAP. XIII.

What Persons, Estates, and Interests, are not barred by a Recovery.

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| <p>§ 1. <i>Persons who are not Parties.</i></p> <p>2. <i>Estate precedent to that of which the Recovery is suffered.</i></p> <p>6. <i>An Executory Devise.</i></p> | <p>§ 8. <i>Estates Tail granted by the Crown as a Reward for Services.</i></p> <p>20. <i>Reversions vested in the Crown.</i></p> <p>23. <i>Tenants by Elegit, &c.</i></p> <p>24. <i>Estates held in Dower.</i></p> |
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Section I.

Persons who are not Parties.

Pigot 65.

NO persons are barred by a common recovery but those who are parties to it, and the issue in tail, the remainder-men, and reversioners, and persons claiming under conditional limitations expectant on, or to take effect after estates tail. Thus, if lands are given to a husband and wife, and the heirs of the body of the husband, remainder over, and the husband alone suffers a common recovery in which he comes in upon the voucher and vouches over, such recovery will bar the estate tail, and the remainder over; but it will not bar the wife's estate, because she is not a party to it.

§ 2. No estates or interests are barred by a common recovery, but those which are subsequent in point of limitation to the estate of which the recovery is suffered; for all interests precedent remain as they were before.

Estates precedent to that of which the Recovery is suffered.

§ 3. Thus, although a recovery be a good bar to a remainder for years limited, to commence after the determination of an estate tail; yet if such term be limited to arise before the estate tail, it will not be barred by a recovery suffered of the estate tail.

Pigot 137.

§ 4. *A.* being tenant for life, remainder to *B.* in tail, *B.* made a lease for years, to commence after the death of the tenant for life. The tenant for life afterwards suffered a common recovery, in which the remainder-man in tail was vouched: and it was determined that the term for years was not barred by the recovery, but that the lessee might falsify it.

Pledgard v. Lake,
Cro. Eliz.
718.
Dyer 518.
in Mar.
Poph. 5.

§ 5. If a person is tenant for life, with remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters as tenants in common in tail, remainder over: and having a daughter, he joins with her in suffering a common recovery, it will be good against the tenant for life, and his daughter, and the remainder-man; but the estates tail limited to the first and other sons, being prior to the estate of the daughter, and being

1 Inst. 204 & note.

being supported by the limitation to the trustees, will not be affected by the recovery.

An Executory Devise.
Tit. 38. c. 17.

§ 6. A common recovery does not bar an executory devise, unless the person to whom the executory devise is given, comes in as a vouchee.

Estates Tail granted by the Crown as a Reward for Services.

§ 8. When recoveries were established as common assurances, the judges determined, that every species of estate tail, whether created by a subject or by the crown, was barrable by a recovery, as also all such remainders over and reversions as were vested in any private persons; and even where the ultimate reversion was vested in the crown, it was fully established that a recovery would bar the issue in tail and all estates in remainder intermediate between the estate tail and the reversion vested in the crown, for, otherwise, a perpetuity might have been created by limiting an ultimate reversion in the crown.

Dyer 32 a.
2 Rep. 15,
50.

§ 9. The power thus allowed by the judges to tenants in tail with reversion in the crown, of barring their own issue, was taken away by the statute 34 and 35 Hen. 8. c. 20. by which it was enacted, sect. 2. " That no feigned recovery to be had by assent
" of parties against any tenant or tenants in tail of any
" lands, tenements, or hereditaments whereof the re-
" version or remainder at the time of such recovery
" had shall be in the king, shall bind or conclude the
" heirs in tail, whether any common voucher be had
" in

“ in any such feigned recovery or not ; but that after
“ the death of every such tenant in tail against whom
“ any such recovery shall be had, the heirs in tail may
“ enter, have, and enjoy the lands, tenements, and hereditaments so recovered, according to the form of
“ the gift of intail, the said recovery, or any other
“ thing or things to be had, done, or suffered by or
“ against any such tenant in tail to the contrary notwithstanding.”

Sect. 3. And “ That the heirs of every such
“ tenant in tail against whom any such feigned recovery shall be had, shall take no advantage for
“ any recompence in value against the voucher nor
“ his heirs.”

§ 10. The object and intention of these acts was, to perpetuate in families, those estates which were given, or procured to be given to them by the crown, as a reward for some eminent services, that they might be a perpetual testimony of the munificence of the crown, and an inducement to those families to persevere in that loyalty which was the original cause of the gift : so that now, whenever a person is tenant in tail of the gift of the crown, and the ultimate reversion in fee continues vested in the crown, neither a fine or recovery, levied or suffered of such estate tail, will bar the issue in tail, the remainder-men, or the reversion which is vested in the crown.

1 Inst. 372 b,

§ 11. Lord *Coke* has observed, that in the construction of these statutes, the judges have laid down the ten following rules : “ 1st, That the estate tail must be
 “ created by a king, and not by any subject, albeit
 “ the king be his heir to the reversion, for the pre-
 “ amble speaks of gifts made to subjects, and none
 “ can have subjects but the king ; and also in the pre-
 “ amble it is said, (for service done to the kings of the
 “ realm), and the body of the act referreth to the
 “ preamble, and therefore if the Duke of *Lancaster*
 “ had made a gift in tail, and the reversion descended
 “ to the king, yet was not that estate tail restrained by
 “ that statute, and so of the like. 2dly, If the king
 “ grant over the reversion, then a recovery suffered
 “ will bar the estate tail, because the king had no re-
 “ version at the time of the recovery. 3dly, If the
 “ king make a gift in tail, the remainder in tail, or
 “ grant the reversion in tail, keeping the reversion in
 “ the crown, a recovery against tenant in tail in pos-
 “ session shall neither bar the the estate tail in posses-
 “ sion by the express purview of the statute, nor, by
 “ consequence, the estate in remainder or reversion,
 “ for that the reversion or remainder cannot be barred,
 “ but where the estate tail in possession is barred.
 “ 4thly, If a subject make a gift in tail, the remain-
 “ der to the king in fee, albeit the words of the sta-
 “ tute be (whereof the reversion or remainder of the
 “ same, &c.) yet seeing the estate in tail was not cre-
 “ ated by a king, as hath been said, the estate tail
 “ may be barred by a common recovery. 5thly, If
 “ Prince

“ Prince *Henry*, son of *Henry* the Seventh, had made
 “ a gift in tail, the remainder to *Henry* the Seventh in
 “ fee, which remainder, by the death of *Henry* the
 “ Seventh, had descended to *Henry* the Eighth, so as
 “ he had the remainder by descent, yet might tenant
 “ in tail, for the cause aforesaid, bar the estate tail by
 “ a common recovery. 6thly, The word (remainder)
 “ in the statute, is no vain word, for the words of the
 “ preamble be, the king hath given or granted, or
 “ otherwise provided to his servants and subjects.
 “ The word (reversion) in the body of the act, hath
 “ reference to these words, (given or granted) and
 “ (remainder) hath reference to these words (otherwise
 “ provided) as if the king, in consideration of money,
 “ or of assurance of land, or for other consideration
 “ by way of provision, procure a subject, by deed in-
 “ dented and inrolled, to make a gift in tail to one
 “ of his servants and subjects, for recompence of ser-
 “ vice or other consideration, the remainder to the
 “ king in fee, and all this appear of record; this is
 “ a good provision within the statute, and the tenant
 “ in tail cannot by a common recovery bar the estate
 “ tail; so it is if the remainder be limited to the king
 “ in tail; but if the remainder be limited to the king
 “ for years, or for life, that is no such remainder as
 “ it is intended by the statute, because it is of no re-
 “ mainder of continuance, as it ought to be, as it ap-
 “ peareth by the preamble, and it ought to have some
 “ affinity with a reversion, wherewith it is joined.
 “ 7thly, Where a common recovery cannot bar the
 “ estate

“ estate tail by force of the said statute, there a fine
 “ levied in fee, in tail, for lives, or years, with pro-
 “ clamations according to the statutes, shall not bar
 “ the estate tail, or the issue in tail, where the rever-
 “ sion or remainder is in the king, as is aforesaid, by
 “ reason of these words in the said act (the said reco-
 “ very, or any thing or things hereafter to be had,
 “ done, or suffered, by or against any such tenant in
 “ tail to the contrary notwithstanding), which words
 “ include a fine levied by such a donee, and restrain-
 “ eth the same. 8thly, But where a common re-
 “ covery shall bar the estate tail, notwithstanding
 “ that statute, there a fine with proclamation shall bar
 “ the same also. 9thly, Where the said latter words
 “ of the statute be (had, done, or suffered by or
 “ against any such tenant in tail), the sense and con-
 “ struction is, where tenant in tail is party or privy to
 “ the act, be it by doing or suffering that which should
 “ work the bar, and not by mere permission, he being
 “ a stranger to the act, as if tenant in tail of the gift
 “ of the king, the reversion to the king expectant, is
 “ disseised, and the disseisor levy a fine, and five years
 “ pass, this shall bar the estate tail *; and so if a col-
 “ lateral ancestor of the donee release with warranty,
 “ and

* The only authority quoted by Lord Coke, in support of this position, is the case of *Stratfield v. Dover*, Trin. 39 Eliz. which is reported in 1 Cro. 595. 612. but no judgment was given on this point; and Justice Walmsley observed, that if such a doctrine were admitted, it would be a common mischief, for then tenants in tail of the

“ and the donee suffer the warranty to descend without
 “ any entry made in the life of the ancestor, this shall
 “ bind the tenant in tail, because he is not party or
 “ privy to any act, either done or suffered by or against
 “ him. 10thly, Albeit the preamble of the statute
 “ extend only to gifts in tail, made by the kings of
 “ *England* before the act, (*viz.* hath given and grant-
 “ ed, &c.) and the body of the act referred to the
 “ preamble (*viz.* that no such feigned recovery here-
 “ after to be had against such tenant in tail) so as this
 “ word (such) may seem to couple the body and the
 “ preamble together, yet in this case (such) shall be
 “ taken for such in equal mischief, or in like case;
 “ and by divers parts of the act, it appeareth that the
 “ makers of the act intended to extend it to future
 “ gifts, and so is the law taken at this day, without
 “ question.”

§ 12. As these statutes deprive tenants in tail of the gift of the crown of all power of alienation, the judges have construed them strictly; and it is observable, that an estate tail of this kind is now the only perpetuity which can possibly be created.

§ 13. It was formerly usual for persons who were seised of estates tail of this kind, to procure the consent of the crown to alienate them which was com-

the gift of the crown might get themselves disseised, in which case, a fine levied by the disseisor, would bar the issue. *1 Sid.* 166.
1 Roll. Rep. 171.

monly

Earl of Chef-
terfield's
Case,
Hard. 409.

monly effected in this manner; the crown conveyed the reversion to a subject, either in trust for itself, or for the tenant in tail, by which means a fine or recovery was a good bar of the estate tail, according to the second rule laid down by Lord *Coke*. Thus it was held by all the judges, that if the king made a gift in tail, reserving the reversion to himself, and afterwards permitted the tenant in tail to suffer a common recovery, by granting the reversion to a stranger, in trust, to reconvey it after the recovery was suffered, it would bar both the estate tail and the reversion, because the reversion was once severed from the crown, by which means the privity of estate was destroyed; for the intention of the statute was only to restrain common recoveries, where the reversion always continued in the crown without any alteration. But, since the statute 1 *Ann*, st. 1. c. 7. s. 5. this mode of evading these acts is effectually prevented, the crown being restrained by that statute from alienating its possessions for a greater estate than three lives, or twenty-one years.

§ 14. No alteration in the limitations of an estate tail, whereof the reversion continues in the crown, will enable the tenant in tail to bar his issue or the reversion.

Murrey v.
Eyton and
Price,
T. Raym.
260.

Pollexf. 491.
2 Show. 104.
Sir T. Jones
237-

§ 15. Thus, in the case of the Earl of *Derby*, one of the questions was, Whether an estate tail, granted by *Richard 3.* to the *Derby* family, as a reward for services, which by a private act of the 4 *Jac. 1.* was limited

limited to the heirs-males of the family, in a different manner from that in which it had been limited by the letters patent, the reversion still continuing in the crown, was within the protection of these statutes? And the majority of the judges in the Exchequer Chamber were of opinion, that, notwithstanding the alterations made by the private act of parliament, as they were all within the compass of the old intail, and as the reversion still continued in the crown, the estate was within the protection of the 34 and 35 Hen. 8.

1 Wilson
Rep. 275.

§ 16. If a person conveys lands to the crown, with an intent that the crown should reconvey them to the same person in tail, reserving the ultimate reversion to the crown, such an estate will not be within the protection of these statutes.

§ 17. Thus, where *William* Earl of *Derby* conveyed lands to trustees, to the intent that they should convey the same to queen *Elizabeth*, her heirs and successors, that the Earl of *Derby* might accept of a grant from the crown of the same lands, to him and the heirs-male of his body, leaving the ultimate reversion in the crown, which was accordingly done. It was determined, that this estate tail was not within the protection of those statutes, it being a fraudulent contrivance to create a perpetuity.

Johnson v.
Earl of Derby
Pigot 201.
11 Mod. 304.
2 Show. 104.

§ 18. No estate tail granted by the crown, will fall under the protection of these statutes, unless the grant appears to have been made as a reward for services.

Perkins v. -
Sewell,
1 Black. R.
654.
4 Burr. 2223.

§ 19. Thus, where it was found by special verdict, that one *William Dexter*, being tenant in fee of the premises, enfeoffed *Henry Earl of Derby*, afterwards king *Henry 4.* to hold to him and his heirs. Afterwards the king, by letters patent under the duchy seal of *Lancaster*, 7 *Hen. 4.* reciting the said feoffment, and that *Margaret* the wife of *John Milton* was granddaughter and heir of *William Dexter*, and that *Milton* and his wife had petitioned the king to be fully re-enfeoffed thereof; *nous voulantz cele partie soit fait, ceo que loy, bone foy, et conscience demandent*, have of our especial grace, given and granted to the said *John Milton* and *Margaret* his wife, and the heirs of the body of the said *Margaret*, the said premises to be holden as of the king and his heirs, dukes of *Lancaster*, as of the duchy of *Lancaster* in chief for ever, with reversion to the king and his heirs, dukes of *Lancaster*, on failure of issue of the said *Margaret*. The question was, Whether the intail created by the letters patent of *Hen. 4.* with the reversion to the king in fee, was, under all its circumstances, such an estate tail as was protected from being barred by a common recovery, by virtue of the statute 34 *Hen. 8. c. 20.*? It was insisted for the plaintiff, 1st, That no estate was intended to be protected by that statute but such as had been given or provided by the king in reward of some special services, because the preamble of the act speaks only of estates granted upon such considerations. 2d, That this grant appeared upon the face of it, to be merely a restitution of what belonged of right to the grantees; an act of justice, and not of bounty in the king; *ceo que loy, bone foy, et conscience demandent*; for

for which purpose, it must be supposed, either that a legal title subsisted in the grantees, paramount to the title of king *Henry 4.* by means of some condition or defeazance annexed to *William Dexter's* feoffment to the Earl of *Derby*, or that *Dexter* and his heirs had an equitable right, and that king *Henry 4.* when Earl of *Derby*, was merely a feoffee to uses. To this, it was answered for the defendant, 1st, That if the words of an enacting clause are wider and more extensive than the preamble, the preamble shall not narrow and confine them; that though the principal purview of the act was, to protect such estates tail as were granted for services done, yet this was not the only reason. The diminution of the king's feudal rights was also expressly alleged as another reason, which would happen oftener by cutting off intails, and thereby preventing infancies and wardships. That if services were indispensably necessary to bring a grant within the protection of the statute, the law would, at this distance of time, presume them. That in the statute of fines, 32 *Hen. 8.* c. 36. there is the same protection of estates tail, the reversion of which is in the crown, and *in pari materia* both statutes should be uniformly construed; that in 1 *And.* 140. and 1 *Inst.* 373. where this statute is fully explained, not a word appears, to prove that services must be stated in the grant. 2d, That an intail which had lasted three hundred and sixty years under the protection of this statute, ought not now to be shaken by presumptions and conjectures. Its having been so long unbarred, gives a presumption, that the owners knew it was unbarable. The first attempt to alter the intail was in 1652, when there was no king in being, and

all the crown lands, as well in reversion as in possession, were vested in trustees for sale; and if the reversion is once out of the crown, the protection is gone. 3d, That there was no ground to suppose a condition or defeazance annexed to *Dexier's* feoffment; as the feoffment is recited, and no mention made of any defeazance or condition. 4th, That supposing the Earl of *Derby* a feoffee to use, which was not proved, still the grant of *Henry 4.* was free and gratuitous; for as the law of uses then stood, before the statute 1 *Rich. 3.* c. 5. if the king, when a private man, was seised to an use, upon the assumption of the crown, the use was extinguished, and the king became absolute owner of the estate. To re-grant it to the feoffor might be generous and honourable, but was (legally speaking) gratuitous. But it could not be the execution of a use, because the king only grants an estate tail, reserving the fee to himself; makes it a tenure *in capite*, and to be holden of the duchy of *Lancaster*, which is quite incompatible with the idea of the Earl of *Derby's* being merely a feoffee to uses, which must have been executed in the same plight, as when the original feoffment was made.

Lord *Mansfield*.—“ It is certain that the preamble
 “ of a statute cannot restrain the enacting part of it,
 “ where the enacting part is clearly larger than the
 “ preamble. But in this case, the estates mentioned
 “ in the enacting part, clearly refer to those in the
 “ preamble, by the word *such*, which runs through
 “ the whole. It must therefore be admitted, that, in
 “ order to obtain the protection of the statute of

“ *Hen.* 8. the estate tail must be of the gift or provision
 “ of the king, by way of reward. As for the services,
 “ which are the consideration of such gift, these must,
 “ at a distance of time, be presumed, and need not be
 “ proved. To take it out of the statute, you must
 “ shew that it is not of the gift, or provision of the
 “ king. And, in the present case, it is plainly not so,
 “ upon the face of it. The petition is founded upon
 “ no other consideration, than that *Elizabeth Milton*
 “ was cousin and heir of *Dexter*, who enfeoffed the
 “ Earl of *Derby*. No merits are mentioned, notwith-
 “ standing the statute 4 *Hen.* 4. c. 4. was then recent.
 “ The king himself states, that he was bound to make
 “ the grant by *law, good faith, and conscience*. What
 “ the circumstances of the fact were, cannot now be
 “ discovered; whether a defeazance, a condition, or
 “ an use, or any thing else. Nor is it material to
 “ know. It is enough, that the king has recited ge-
 “ nerally, that he was bound to do it. It cannot,
 “ therefore, be a gift. As to the objection, that the
 “ king granted only a particular estate, and kept back
 “ the fee, that might be all he was bound to do. Nor
 “ can we reason very conclusively from the conduct of
 “ such a prince as *Henry* the Fourth. He might pos-
 “ sibly do only half justice. Such things have hap-
 “ pened in later times. Lord *Anglesey*, after the Re-
 “ storation, was obliged to restore the estates he had
 “ got during the rebellion in *Ireland*; yet many of the
 “ poor owners were glad to compound, and take
 “ leases for 99 years, instead of the fee. Upon the
 “ whole, as the estate was not of the king’s gift, I
 “ think it not within the protection of the statute, and

“ therefore the recovery is good.” Mr. Justice *Tates* was of the same opinion, and said, the court would not stretch to enlarge the interpretation of a statute, which prohibits the natural right of alienation by tenant in tail.

Reversions
vested in the
Crown.
Pigot 85.
Neale v.
Wilding,
1 Will. R.
275.

Plowd. 553.

§ 20. Before the statute *de Donis*, when the king created a conditional fee, there remained nothing in the crown but a bare possibility, and if the donee had issue, and afterwards aliened, the king's possibility was barred as well as that of the subject. After the statute *de Donis* had turned that possibility into a reversion, and after common recoveries were allowed to be common assurances, and to bar remainders and reversions, it became a question how far a recovery could bar a remainder or reversion vested in the king; and it was determined by the judges, that though a recovery suffered by a tenant in tail barred the estate tail, yet it would not affect any interest which the king had in the remainder or reversion; as they did not venture to assert that the crown could be deprived of any part of its revenue, under pretence of a recompence in value, which was merely imaginary.

Pigot 85.

Plowd. 553.

§ 21. Mr. *Pigot* says, it is *vexata questio* how far at common law a remainder vested in the king, was divested by recovery and discontinuance, but he afterwards admits, that neither a fine nor recovery can divest any estate in remainder or reversion out of the king. He then says, that if a recovery be on good title against tenant in tail, and the king has the remainder by a defeasible title, there it shall divest the remainder
out

out of the king, and restore and remit the right owners. This position is founded on the determinations in *Wise-man's case* 2 *Rep.* 15. and *Cholmeley's case* *id.* 50. where the court determined, that the limitation of the reversion to the crown was void, and, therefore, that such reversion was barred by a recovery; but it was admitted, that if the reversion had been vested in the crown, it could not have been barred.

§ 22. The only mode of acquiring a good title to an estate tail, whereof the reversion is in the crown, is by an act of parliament, enacting that the reversion shall be divested out of the crown and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a recovery. Vide 30 G. 3. ch. 51.

§ 23. By the statute 21 *Hen.* 8. c. 15. it is enacted, that no estate held by statute-merchant, staple, or elegit, shall be barred by a common recovery. Tenants by Elegit, &c.

§ 24. By the statute 11 *Hen.* 7. c. 20. no estate held by a woman in dower, or as a jointure, can be barred by a recovery suffered by such woman. Estates held in Dower, &c. Ante ch. 8. f. 22.

TITLE XXXVI.

RECOVERY.

CHAP. XIV.

How Recoveries may be reversed or falsified.

- | | |
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| § 1. <i>Writ of Error.</i>
4. <i>Who may bring this Writ.</i>
10. <i>No Averment against the Record.</i>
15. <i>The Parol does not demur for Infancy.</i>
17. <i>There must be a Writ of Scire Facias.</i> | 20. <i>A Release of Errors from the Common Vouchee not good.</i>
22. <i>Writs of Error must be brought within Twenty Years.</i>
25. <i>Of falsifying a Recovery.</i>
30. <i>A Tenant for Years may falsify.</i>
33. <i>Courts of Equity.</i> |
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Section 1.

Writ of
Error.
Fines ch. 14.
f. 1.

THE judgment obtained in a common recovery, being a matter of record, and similar in almost every respect to a judgment given in an adversary suit, can only be reversed by a writ of error.

Id. f. 3.

§ 2. A writ of error to reverse a common recovery must be brought in the Court of King's Bench, unless the error is in the process, in which case it may be reversed in the Court of Common Pleas.

§ 3. By the stat. 34 and 35 *Hen. 8. c. 26. f. 113.* it is enacted that all judgments given at the Great Sessions in *Wales*, shall be redressed by writ of error returnable in the Court of King's Bench in *England*.

§ 4. No

§ 4. No person has a right to bring a writ of error for the purpose of reversing a common recovery, unless he had an immediate interest in the lands, whereof the recovery had been suffered.

Who may
bring this
Writ.

§ 5. Thus where a writ of error was brought in the Court of King's Bench to reverse a common recovery, and judgment was obtained thereon; but it appearing afterwards that the plaintiff in error had no immediate title to the lands, there being a remainder-man before him, the court reversed their former judgment of reversal.

Anon.
5 Mod. 396.

§ 6. The right to bring a writ of error descends to the person to whom the land would have descended in case the recovery had not been suffered.

§ 7. *Thomas Henningham* being seised to him and the heirs-male of his body, had issue *Henry* and three daughters by his first wife, and *Arthur* and two other sons by his second wife. Upon the death of *Thomas Henningham*, *Henry* his eldest son entered, and suffered a common recovery, and afterwards died without issue. *Arthur* the second son brought a writ of error to reverse this recovery, to which it was objected that he was only of the half blood. The court however determined that the right to bring a writ of error descended to the person who would have been intitled to the land, if no recovery had been suffered.

Henningham
v. *Windham*,
1 Leon. 261.

§ 8. In the case of *Sheepshanks v. Lucas* which has been already stated, an objection was made to the writ

Ante ch. 5.
f. 14.
1 Burr. 412.

of

of error, because the plaintiff did not shew how his title arose. But the court said, that a complete title need not be set forth in a writ of error; it was only required of the plaintiff in error to shew the connection and privity between the person against whom the recovery was had, and the person who brings the writ of error; for it was not like a proceeding to try the right of land, or to recover the land itself.

Marquis of
Winchester's
Case,
3 Rep. 1.

§ 9. The right of bringing a writ of error to reverse a common recovery does not pass to the crown on an attainder for high treason. A tenant in tail suffered a common recovery, the remainder-man was attainted of treason and executed; and by Act of Parliament forfeited to the king all his manors, &c. reversions, remainders, uses, possessions, offices, rights, conditions, and all other his hereditaments. The recovery being erroneous the king brought a writ of error to reverse it. Adjudged that the writ was not given to the king by any words in the act of forfeiture, the party having no right of entry, but only a right of action which did not pass by those general words. But admitting the writ of error had passed to the king by the words of the act, yet it would not pass from him to a patentee by a general grant of the manor *cum pertinentiis*, and of all the interest, claim and demand therein, notwithstanding the clause *de speciali gratia*. For if the king could grant it, it must be by virtue of his prerogative (for no common person could do it) and then it ought to be by express and precise words,

§ 10. The errors assigned in a recovery may either be in fact, or in law; but nothing can be assigned for error in a common recovery which contradicts the record; it follows from this principle that no incapacity in a vouchee can be assigned for error, where he appeared in person; but if a vouchee appears by attorney, an averment may then be made, either that such vouchee died before the day on which judgment was given, or that he laboured under some personal disability which rendered him incapable of suffering a common recovery.

No Averment
against the
Record.
Tit. 35. ch. 2.
f. 54.

§ 11. Thus in the case of *Wynne v. Wynne*, one of the questions was, whether the plaintiff in error was not estopped to assign the death of the vouchee to have happened on the 10th of *May*, which was before judgment, when it appeared upon the face of the record, that she appeared by attorney on the return day of the writ of summons which was the 16th of *May*. The court were clearly of opinion that the death of the vouchee before judgment, was not contrary, but a matter collateral to the record, and properly assignable for error, and triable by a jury; for all the record said was, that the vouchee appeared by her attorney; it did not say any thing of her actual existence at the time, but put a matter in issue, which was properly triable by the country.

Ante, ch. 5.
f. 13.
1 Will. Rep.
42.

§ 12. In a writ of error to reverse a common recovery, the error assigned was, that the vouchee was within age and appeared by attorney. All the court

Holland v.
Dauntzey,
Cro. Eliz.
739.

agreed

agreed that this circumstance might well be assigned for error after the death of the vouchee.

Ante ch. 8.
f. 9.

§ 13. So in the case of *Stokes v. Oliver* an averment was allowed, that the vouchee, who appeared by attorney, was an infant, and the recovery was reversed.

Vide the
Appendix.

§ 14. No case has arisen where an averment of ideocy has been made against a vouchee who appeared by attorney, but in a late case which was determined in the House of Lords in *Ireland*, such an averment was held to be good, and not contrary to the record,

The Parol
demurs for
Infancy.

§ 15. In a writ of error to reverse a common recovery the parol shall demur for the infancy of the tenant.

Aland v.
Malone,
Fitz. R. 114.

§ 16. In a writ of error of a judgment in the King's Bench in *Ireland*, the case was that in a writ of error to reverse a common recovery the defendant pleaded that he was an infant and prayed that the parol might demur. To this the plaintiff demurred, and judgment was given that the parol should demur. The judgment was affirmed. Note, to the writ of error in this court, the defendant again pleaded his infancy and prayed the parol might demur, which was disallowed. *Non datur enim exceptio ejusdem rei cujus petitur dissolutio.*

There must
be a Writ of
Scire Facias.
Lord Pembroke's Case,
Rep. Temp.
Holt 614.

§ 17. A recovery ought not to be reversed, unless writs of *scire facias* are issued against the terre-tenants and the heir; because the errors in a recovery ought
not

not to be examined until all the parties interested in supporting it, be before the court.

§ 18. The issuing writs of *scire facias* to the terre-tenants is not deemed to be *ex necessitate juris*, but only discretionary in the court.

§ 19. Thus on a motion in the Court of King's Bench to set aside a judgment of reversal of a common recovery on a writ of error brought there, because there was no *scire facias* to the terre-tenants. It was strongly debated and on all hands agreed to be very inconvenient, that a *scire facias* should not be to the tenants, for otherwise a purchaser might be deprived of his assurance without notice. There was urged that the terre-tenant cannot be party to the writ of error. That they had a record exemplified of the reversal. That the reversal was in 35 Car. 2. That the want of a writ of *scire facias* must be error either in law or in fact, it would not be error in law, for that must appear upon the record itself, which it did not here. It could not be error in fact, because there was no necessity for such a writ, it was only discretionary in the Court and not *ex necessitate juris*. The Court was of opinion that the awarding writs of *scire facias* to the terre-tenants was discretionary. And in a subsequent case Lord Mansfield said that by the established mode of proceeding there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity, but no more.

Kingston v.
Herbert,
2 Show. 490.
2d Edit.
3 Mod. 119.

Hall and Ux.
v. Woodcock,
1 Burr. 359.

A Release of
Errors from
the Common
Vouchee not
good.

§ 20. A release of errors from the common vouchee cannot be pleaded in bar of a writ of error to reverse a common recovery.

Lord Norrice
v. Marquis of
Winchester,
Cro. Eliz. 2.

§ 21. In a writ of error to reverse a common recovery the defendant pleaded a release of all errors by the last and common vouchee. It was resolved by all the Judges that such release could not be pleaded, for the common vouchee is put in only for form, and in truth he renders nothing, and therefore it is against reason that his release should bar others that have the loss, and are entitled to have remedy by the reversal of the judgment.

Writs of
Error must be
brought
within 20
Years.

§ 22. By the statute 10 & 11 W. 3. c. 4. reciting that fines, recoveries, and judgments, were reversible at any time without restraint or limitation for any error or defect which happened therein, by the ignorance or carelessness of clerks, and sometimes by unavoidable accidents, it is enacted, § 1. "That no fine or
" common recovery, &c. shall be reversed or avoided
" for any error or defect therein, unless the writ of
" error or suit for the reversing of such fine, recovery,
" &c. be commenced or brought and prosecuted with
" effect within twenty years after such fine levied, or
" such recovery suffered. § 2. Provided always that
" if any person who shall be intitled to any such writ
" of error as aforesaid shall at the time of such title
" accrued be within the age of twenty-one years or
" covert, *non compos mentis*, imprisoned or beyond the
" seas, then such person, his or her heirs, executors
" or administrators (notwithstanding the said twenty
5† " years

“ years expired) shall and may bring his, her, or their
 “ writ of error for the reversing any such fine, reco-
 “ very, &c. as he, she, or they might have done in
 “ case this act had not been made, so as the same be
 “ done within five years after his or her full age, dis-
 “ coverture, coming of sound mind, enlargement out
 “ of prison, or returning from beyond the seas, or
 “ death, but not afterwards or otherwise.”

§ 23. In consequence of this statute a writ of error to reverse a fine must be brought within twenty years after the fine has been levied, and not within twenty years after a title has accrued ; for the time when the fine was levied is the period from which the twenty years are to be reckoned.

§ 24. A writ of error was brought 19 *Geo.* 2. to reverse a common recovery which was suffered in 5 *Ann.* The defendant pleaded this statute in bar, the writ of error not having been brought within twenty years after the recovery was suffered, to which it was answered that the plaintiff's title did not accrue until the death of one of the vouchees without issue in the year 1739.—After several arguments the court determined that the writ of error did not lie ; because the statute 10 & 11 *W.* 3. was made to quiet possessions, and to fix a certain period beyond which fines and recoveries should not be impeached, for the words of the statute are express, “ twenty years after such fine levied or recovery suffered.” And it has not the words which are in the statute of fines, *viz.* after the title accrued. The *terminus a quo* is the time when

Lloyd v.
 Vaughan,
 2 *Stra.* 1257.

when the recovery is suffered, and if that was once exceeded, there would be no knowing where to stop ; a reversioner after an estate tail which had subsisted above a century might upon this principle be allowed to reverse a common recovery, whereas persons in reversion were never the objects of the legislature's care. It was sufficient that they had a chance of the reversions vesting with the twenty years, in which case they might bring a writ of error but not afterwards.

Of falsifying
a Recovery.

§ 25. As a common recovery can only be reversed by a writ of error or some proceeding of a similar nature, to which none are intitled but those who have an immediate interest in the lands ; the law allows all strangers whose interests are affected by a recovery to falsify it.

Ps. 77.
Figot 156.

It is laid down by *Booth* in his *Law of Real Actions*, that a recovery may be falsified several ways. 1. By entry and plea. 2. By action. 3. By action and plea, and 4. By plea only.

§ 26. By entry and plea, when the party's entry is not taken away by the recovery and he brings an assise, and the recovery is pleaded against him, then he pleads matter to avoid the recovery. It follows from these principles, that a common recovery may be invalidated on a trial in ejectment ; for if a recovery is given in evidence and set up by way of defence, the plaintiff may shew any defect in the recovery, and if the court is of opinion that the recovery is void
and

and the plaintiff intitled to recover, such recovery is completely falsified as to that action.

§ 27. Thus in the case of *Sir Butler Wentworth*,^{1 Vezey 403; 3 Atk. 313.} which was tried at the bar of the Court of Common Pleas in *Mitch. Term* 1744, evidence of weakness of understanding was admitted to invalidate the deed, by which a tenant to the *præcipe* was made for the purpose of suffering a common recovery, and the effect of the recovery was by that means defeated.

§ 28. So in the case of *Jones, ex dem. Hale v. Cave*, tried at *Hereford* at the *Lent Assizes* 1765, by Sir *John Eardley Wilmot*, evidence was admitted to prove the weakness of understanding of the vouchee in a common-recovery, who appeared by attorney, and the recovery was by that means invalidated. A motion was made the next term for a new trial, on account of misdirections of the judge, and it was contended that such evidence ought not to have been admitted; but the motion was refused.*
Vide Appendix.

§ 29. A recovery may also be falsified by action and plea, when the entry of the party that has right is taken away by the recovery, and upon a real action brought, the recovery is pleaded in bar of his right. This may be falsified by plea.
Booth 77. 6 Rep. 8 &

* The cases of *Dormer v. Parkhurst*, *Goodtitle v. Duke of Chandos*, and *Taylor v. Horde*, which have been stated in the former part of this volume, are instances of recoveries falsified in ejectment.

A Tenant for
Years may
falsify.
1 Inf. 46 a.

§ 30. By the Common Law, if the tenant of the freehold had suffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold; for the person who recovered the lands was supposed to come in by a title paramount, so that he was not bound by the leases of the person against whom he recovered: besides, a termor for years could not in any case falsify a common recovery.

Plowd. 83.

§ 31. By the statute of *Gloucester*, 1 Edw. 1. c. 11, a remedy was given to the lessee for years, by way of receipt and trial, whether the recovery was upon good title; or by way of collusion; and in case it appeared that the recovery was by collusion, then the lessee for years was permitted to enjoy his term, and the execution was staid until the determination of the term.

Bro. Ab. Tit.
Lease 26.
Fitz. N. B.
198 and 220.
Vaugh. 127.

§ 32. The operation of this statute not having been found sufficiently extensive, another act was made 21 Hen. 8. c. 15. whereby it was provided that a tenant for years might falsify a feigned recovery had against the person in reversion, and that no estate held by statute merchant, staple, or elegit, should be avoided by means of any feigned recovery.

Courts of
Equity.

§ 33. Although a common recovery can only be reversed by the Court of Common Pleas in the first instance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can, in fact, invalidate a com-
mon

mon recovery, where it appears to have been obtained by fraud or imposition, by compelling the recoverer to convey the estate to the person who is intitled in equity to have it, or by declaring the recoverer to be a trustee for such person.

Titt. 35.
c. 14. l. 64.

§ 34. Where a person who was deaf and dumb suffered a common recovery of intailed lands, assisted by his uncle, and then settled the same to certain uses. Upon the circumstances of the case it appeared he had done nothing but what in conscience he ought to have done, yet being under these circumstances, the Lord Chancellor said he ought to be taken care of in equity, and it appearing that the uncle was concerned in point of interest, the settlement was set aside. But had he been assisted by an able and faithful relation that was not interested, equity would not have relieved him in so reasonable an act as this appears to be.

Ferres v.
Ferres,
2 Ab. Eq.
695.

§ 35. A Court of Equity will also restrain the operation of a common recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect.

§ 36. Where a father on his son's marriage, by lease and release conveyed lands to trustees and their heirs, to the use of the father for life, remainder to his wife for life, remainder to the son for ninety-nine years, if he should so long live, remainder to trustees during his life to support contingent remainders, re-

Stanhope v.
Thacker,
Prec. in Chanc.
435.

mainder to the son's intended wife for life for her jointure, remainder to the first and every other son of that marriage in tail male, remainder to the daughter or daughters of that marriage and the heirs of their bodies, till they should, out of the rents, issues and profits, have received 3000 *l.* remainder to the heirs of the body of the son, remainder to the second son of the father, and to his first and other sons, remainder to the right heirs of the son for ever. The marriage took effect, and they had only two daughters, who being in possession after all the other estates determined, which were precedent, suffered a recovery to the use of themselves and their heirs; and one question in this case was, whether by this recovery the remainders were not barred. And it was argued that they were, because the primary intention of this limitation was to make them tenants in tail, and the raising of the 3000 *l.* was but a secondary intention thereof, and when they being so tenants in tail, suffered a recovery, this barred their estate tail, and the remainders depending thereon; but the Lord Chancellor was clear of opinion, both upon the first speaking to it, and the next day after, that this was but in the nature of a security for the 3000 *l.* and though the recovery barred the estate tail and remainders at law, yet the daughters were but in the nature of trustees (after the 3000 *l.* raised) for those in remainder; that before the recovery they had but an estate tail for their security for that sum; that after the recovery they had the fee simple; but still the same in a Court of Equity was but a security till that money

was raised; that those in the remainder had the equity of redemption in the same manner as the person who made that security would have had if no such limitation in remainder had been; that therefore they might at any time, by paying off that 3000*l.* determine the estate of the daughters, and then the daughters would be but trustees for them.

APPENDIX to Title XXXVI,

RECOVERY.

*HOUSE of LORDS of Ireland, 1785,**Gustavus Hume Esquire, Plaintiff in Error.**William Burton Esquire, Defendant in Error.*

A WRIT of error was brought in the Court of King's Bench in Ireland, to reverse a common recovery, suffered by *Nicholas Earl of Ely* in 1767, in which he appeared by attorney, (having acknowledged a warrant of attorney before the Lord Chief Justice of the Common Pleas for that purpose): and the error assigned was, that the Earl of *Ely* was of unsound mind. Issue being found upon this fact, the plaintiff in error offered to produce evidence of the incapacity of the said Earl; but the counsel for the defendant insisted, that the acknowledgment of the warrant of attorney before the Chief Justice was a judicial act and matter of record, and was conclusive evidence of the said Earl's sanity. The court was of opinion, that the evidence could not be admitted. A bill of exceptions was tendered, and a writ of error brought in the House of Lords of *Ireland*, where the following question was put to the judges: "Whether, in a case where the
 " vouchee in a common recovery appears by attorney,
 " the caption of the warrant of attorney, appointing
 " such

“ such attorney, appearing upon the record to be taken
“ by the Chief Justice of the Common Pleas out of
“ court, was conclusive evidence of the capacity of
“ such vouchee, as to the soundness of his mind to
“ make such attorney and to suffer such recovery ?”

The judges were divided : but the majority were of opinion, that the caption of the warrant of attorney, appearing on the record to be taken by the Chief Justice out of court, was not conclusive evidence of the capacity of the vouchee. Whereupon, it was ordered and adjudged, that the judgment given in the court of King's Bench should be reversed ; and that the verdict should be set aside and annulled ; and that the parties should proceed to a new trial upon the issue joined between them, as in the said record.

A new trial was had, when the plaintiff's counsel offered to give parol evidence, to prove the fact upon which the issue was joined ; but the counsel for the defendant insisted, that the plaintiff ought not to be allowed to go into such evidence, as they, on the part of the defendant, had evidence of record to produce, which was conclusive to the fact in issue, and, therefore, could not be controverted ; (that is to say), a commission issued out of the Court of Chancery, to try the sanity of the said *Nicholas* Earl of *Ely*, and the inquisition taken in consequence of such commission, by which it was found, that the said *Nicholas* Earl of *Ely* was not an idiot, or a person of unsound mind ; and also a fine, with proclamations, levied of the lands of which the recovery, sought to be impeached, had

been suffered and taken before the Chief Justice of the Common Pleas on the same day, on which the warrant was acknowledged; which fine was levied to *Henry Loftus*, for the purpose of making him tenant to the *præcipe* in that recovery. The court being of opinion, that this was the proper mode of proceeding, the defendant's counsel accordingly gave in evidence to the jury the said commission and inquisition, finding that *Nicholas Earl of Ely* was not an idiot, or person of unsound mind, and also a fine with proclamations, levied by the said *Nicholas Earl of Ely* of the lands, &c. in the said recovery, to *Henry Loftus*, for the purpose of making him tenant to the *præcipe*, and which was taken by the Lord Chief Justice of the Court of Common Pleas on the 8th of *July* 1767, being the same day on which the acknowledgment of the warrant of attorney was taken by the same Chief Justice. And the counsel also gave in evidence the warrant of attorney, and the caption thereof. And the defendant's counsel thereupon insisted, that the said inquisition, finding that *Nicholas Hume Earl of Ely* was not an idiot or person of unsound mind, had for ever concluded that question. That the fine and recovery were both before the court; that the fine was of the same lands, and passed the same estate on the same day to the tenant to the *præcipe* in the recovery, on which the warrant of attorney was acknowledged, and that it constituted part of the same assurance; that the fine gave and was meant to give operation to the recovery, and that, without it, the recovery would have been a mere nullity; that, therefore, there was a mass of evidence, conclusive as to the sanity of *Nicholas Earl of Ely*, and

of a nature not to be controverted, laid before the court; and that no parol evidence could or ought to be received on the part of the plaintiff, as to the issue depending.

The court having declared it to be their opinion, that the said fine, *præcipe*, and concord, together with the caption of the said fine, as likewise the said warrant of attorney, and the caption thereof, were conclusive evidence of the sanity of the said Earl of *Ely* upon the said issue; a verdict was therefore found for the defendant, and judgment given thereon by the Court of King's Bench, "that the judgment of the Court of Common Pleas should be in all things affirmed, and remain in full force and effect, notwithstanding the causes assigned for error."

A bill of exceptions was taken to the opinion of the court; and a writ of error was brought in the House of Lords, where the following questions were put to the Judges;

1st, Whether the commission set forth in the said record, and the inquisition thereon, whereby it was found that *Nicholas Hume* Earl of *Ely*, in the said commission named, was not, at the time of taking the said inquisition, an idiot, or a person of unsound mind, with the return of the execution of the said commission, which were given in evidence on the part of the defendant in error on the trial of the issue at the bar of the Court of King's Bench, in *Michaelmas* term, in the year 1784, joined upon the averment taken by

* 6

the

the plaintiff in error in the said cause, was, in point of law, conclusive evidence of the sanity of the said *Nicholas Hume* Earl of *Ely*, at the time of taking the warrant of attorney set forth in the present record, and of his capacity at that time as to the soundness of his mind, to make such warrant of attorney, and suffer such recovery, as in the said record; so as to justify the said Court of King's Bench in refusing, upon the trial of the aforesaid issue, to suffer the plaintiff in error to go into parol evidence offered by him to prove that the said *Nicholas* Earl of *Ely*, was of unsound mind at the time of the said warrant taken and acknowledged, and the said recovery suffered?

2d, Whether the commission and the inquisition and return thereon, whereby it was found that *Nicholas Hume* Earl of *Ely*, was, at the time of taking the said inquisition, not an idiot or a person of unsound mind, together with the fine, *præcipe*, concord, and caption of the said fine, as likewise the warrant of attorney and the caption thereof, on the 8th day of *July* 1767, as set forth in the said record, and what part of the said evidence were, in point of law, conclusive evidence upon the issue, which came on to be tried at the bar of the Court of King's Bench, of the sanity of the said *Nicholas Hume* Earl of *Ely*, and of his capacity as to the soundness of his mind to make such warrant of attorney, and suffer such recovery, as in the present record, issue having been joined upon the averment taken by the plaintiff in error on the said cause, after the death of the said *Nicholas*, and the said warrant of attorney and caption thereof set forth in the record,
 appearing

appearing to have been made and acknowledged before the said Chief Justice of the Court of Common Pleas, at the same time that the caption of the said fine was taken and acknowledged by and before him, and it appearing to the said court upon the said record, that the tenant to the *præcipe* in the said recovery was made by fine, levied and acknowledged by the said *Nicholas*, so as to warrant the said Court of King's Bench, in refusing upon the trial of the aforesaid issue to permit the plaintiff in error to go into parol evidence, offered by him to prove that the said *Nicholas* was of unsound mind at the time of the said fine taken, and warrant of attorney acknowledged, and recovery suffered ?

3d, Whether, in case where a fine with proclamations is levied by tenant in tail, and the *præcipe* is brought in the same term against the conusee of such fine, and a common recovery suffered thereupon, such fine, *præcipe*, and common recovery, are to be considered in law as one common assurance or conveyance, or as separate common assurances or conveyances.

As to the first question, the judges were unanimously of opinion, that the commission and inquisition were not conclusive evidence of the sanity of *Nicholas* Earl of *Ely*. As to the second question, four of the judges were of opinion, that the acknowledgment of the fine was not conclusive evidence of the sanity of *Nicholas* Earl of *Ely*, and three of the judges were of a contrary opinion. And as to the third question, the Judges were unanimously of opinion, that the fine and recovery were to be considered as one assurance.

The

The judgment of the Court of King's Bench was affirmed.

The author has been favoured with the following accurate note of Lord Chief Baron *Telverton's* argument in this case. And as his Lordship's opinion coincided with that of the majority of the Judges, and also of the Lord Chancellor, it is presumed, that it must prove extremely acceptable to the profession.

Lord Ch.
Baron Yel-
verton.

The Court of King's Bench has determined, and the Judges have all agreed, that the inquisition finding *Nicholas* Earl of *Ely* not to have been an idiot, or of unsound mind, is not conclusive evidence of his sanity at the time of acknowledging the warrant of attorney mentioned in the question: your Lordships have determined that the warrant of attorney is not in itself conclusive evidence of the sanity of Lord *Ely*, at the time of acknowledging such warrant; but that it is a matter in *pais*, and triable by a jury: the only remaining question, therefore, is, whether the fine be conclusive evidence of his sanity, at the time of acknowledging the warrant. The fine, I do admit, is *quasi* a judgment, and, in that light, I will beg leave to consider it; but it is not therefore conclusive evidence of the sanity of the conusor, to do another act.—In what cases judgments shall conclude either as pleas or as evidence, is no where better defined than in that learned argument of Lord Chief Justice *De Grey*, in the *Duchess of Kingston's* case: “First, that the judgment
“ of a court of concurrent jurisdiction, directly upon
“ the point, is as a plea, a bar, or as evidence, con-
“ clusive

“ clusive between the same parties, upon the same
 “ matter, directly in question in another court. Se-
 “ condly, that the judgment of a court of exclusive
 “ jurisdiction, directly upon the point, is, in like man-
 “ ner, conclusive, upon the same matter, between the
 “ same parties, coming incidentally in question, in
 “ another court, for a different purpose. But neither
 “ the judgment of a concurrent or exclusive jurisdic-
 “ tion is evidence, of any matter which came colla-
 “ terally in question though within their jurisdiction ;
 “ nor of any matter incidentally cognizable ; nor of
 “ any matter to be inferred by argument from the
 “ judgment.”

These rules are laid down with so much precision and accuracy, that there is not a word contained in them which has not its sterling value ; nor has a case been cited, nor do I believe a case can be put, which does not fall within them ; for either they are cases, where acts of parliament have established exclusive jurisdiction, between certain parties, as the certificates of commissioners for settling army accounts, or the proof of debts before commissioners of bankrupts under the controul of the great seal, or sentences in matrimonial causes annulling a marriage, where one of the parties, in a civil suit, claimed a title, or founded a defence upon such marriage ; or sentences of exclusive jurisdiction, acting directly in *rem*, and to which all the world are supposed to be parties, as condemnations in the Court of Exchequer, which are had by public proclamations, inviting all persons whatsoever to come in and claim their property, or the sentences of Admiralty

talty courts, which judge between nation and nation, and from whose decision there lies no appeal but to the sword. But, in all these cases, the parties to the suits, or the parties against whom the evidence was received, were parties to the sentences, and had acquiesced under them, or derived under those who had ; or they were sentences in suits to which all persons were or might have been parties.

Now, if a fine were like an ordinary judgment of a court of competent jurisdiction, it would not be conclusive evidence in the present instance, and for these reasons ; because there is no act of parliament which has made a fine under these circumstances conclusive against a remainder-man ; the remainder-man does not claim under the fine, he never could be said to acquiesce under it, because he could not impeach it, he is no party to it, nor does he claim under any man who is. And though I must acknowledge that fines do in some respects stand on a ground peculiar to themselves, a ground whereon the wisdom of our ancestors hath placed them, for the assurance of titles, and quieting of possessions ; yet I must say that, that memorable act, which gives to fines their present force and efficacy, which directs their operation, and where they operate, has made them irresistible, does not in any of its provisions materially depart from those rules, under which other judgments have been held to be conclusive : for the effect of that act is two-fold. Under that act a fine with proclamations, by tenant in tail, whether the proclamations are finished in his life-time or not, will bar the issue in tail. But why ?

because the fine is *quasi* a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment.—Again by that statute, a fine, with proclamations, if five years after the title accrued are suffered to pass without claim, will bar every man who does not come within the savings of that act. But why? because there the fine acts, *quasi in rem*, for by the proclamations, all men are invited to claim, if any right they have, and having failed to do so, within the time prescribed by law, they are therefore barred. But the case of the plaintiff in error does not fall within either of these conclusions, for he is not the issue in tail of the conusor of the fine; nor is the fine produced against him, as a judgment to bar his right. If the defendant in error intended to make that use of it, he ought to have pleaded it to the writ of error, and have given the plaintiff an opportunity of replying that he claimed within the five years, or that he came within the savings of the act. The fine is therefore offered, not as a bar to the right of the plaintiff in error, by its own force, but as conclusive evidence of the sanity of a conusor to do another act, which is a bar to his right. And so, though it does not bar the right, it takes away the remedy; and though it would not conclude, if pleaded as a judgment, yet, when offered as a piece of evidence, it shall have the magic virtue of sealing up the lips of the court and the jury, the parties and the witnesses.—But I know of only one case, where it has been held that a fine is conclusive to the capacity of the conusor to do another act, and this is the case of a fine and a deed leading the uses of
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that fine. In that case, it has certainly been held for law, that a man whose right is by law barrable by a fine, shall not be received to aver against the capacity of the conusor to execute the deed; because it is said, the fine is the principal, and the deed the accessory; and a man who is enabled to do the principal, shall not be held disabled to do the accessory. But that rule of law was adopted through necessity, because all fines operate to uses, and uses are governed by the intent. Whereas if the deed were avoided, the fine would no longer operate to the uses to which it was intended to enure, and so the fine would in effect be avoided, because the uses of it could not take place. But to apply that rule to the case of a fine and recovery, it would be necessary to establish two positions, neither of which is true. First, that the fine is the principal, and the recovery the accessory; and, secondly, that if you avoid the recovery, you also avoid the fine. But there is not a single saying in the books, that the fine is the principal, and the recovery the accessory; for the only use of making the tenant to the *præcipe* by fine, is, to put the evidence of there being a good tenant to the *præcipe* on record; and though you should avoid the recovery, the fine will nevertheless stand, for the writ of error does not impeach, nor will the judgment reach it. And *vice versa*, though the fine should be hereafter avoided, yet the recovery would not be thereby avoided, if it were otherwise good. And with respect to a recovery, and a deed leading the uses of a recovery, the law is the very reverse of what it is in the case of a fine, and a deed leading the use of a fine. In the case of a recovery

recovery and deed, the deed has in more instances than one been held to be the principal, and the recovery the accessory; and accordingly a party, whose right would be otherwise barred by the recovery, has been allowed to impeach the sanity of the vouchee, at the time of the execution of the deed, and so avoid the operation of the recovery.—But it seems to be conceived that there is something or other in this case, which distinguishes it out of the ordinary rules of law. I will therefore beg leave to examine, what that something is, by applying myself immediately to the interrogatories contained in the question. And, first, the question imports a doubt, whether two or more acts, do in point of law, make one and the same assurance: the capacity of the agent to do one act does not conclude to his capacity to do the other; and consequently, whether the capacity of Lord *Ely* to levy the fine, does not conclude his capacity to acknowledge the warrant of attorney: but my answer is, that there is only one instance in which the capacity of an agent to do one act, concludes to his capacity to do another, where the two make one assurance; and that is the case of a fine and deed leading the uses; but in every other case but that, I answer in the negative; and I prove the truth of my answer thus. If a man had levied a fine twenty years ago, with intent to make a tenant to the *præcipe* in a recovery then intended to be suffered, and the recovery is not suffered for twenty years after, the fine and recovery are in point of law, one and the same assurance, as much as if they were both of the same term; and yet no man in his senses will say that a fine levied twenty years

ago, is conclusive evidence of the sanity of the conusor twenty years after. But then the question asks, where two acts are done at one and the same time, and one of those acts is in itself conclusive evidence of the capacity of the agent to do that act, shall it not be conclusive evidence of his capacity to do the other. But my answer to that question is also in the negative; because if it were otherwise, then the act which is in itself conclusive evidence of the agent's capacity to do that act, would be conclusive evidence of his capacity to do any other act whatsoever, whether it made a part of the same assurance or not. And so if an idiot levied a fine, and the history of the law proves, that idiots have been received to levy fines, and at the same time made his will, that fine would be conclusive evidence of his capacity to make such a will, which no man in his senses will maintain. But the question enquires farther, whether, where two acts, the one of which is conclusive in itself, and the other not, make but one assurance and are done at one and the same time, these two circumstances put together, do not make one act conclusive evidence of the capacity of the agent to do the other. But I answer, not, because I believe no two acts can be supposed more intimately connected with each other, both in unity of time, and of assurance, than a will of a real and a personal estate, written upon one and the same piece of paper or parchment, and subscribed by one and the same signature; and yet it is clear law, that though the probate of such a will is conclusive evidence of the sanity of the testator to make such will, yet it is by no means conclusive evidence of his capacity

capacity to dispose of his real estate. And why? evidently because the capacity of the party to do the two acts is triable by different jurisdictions. And the same reason applies to the case of the fine and the warrant of attorney: for as the capacity of the testator in the first case is triable by the Judge of the Spiritual Court, as to the personal estate, and his capacity as to his real estate by a jury, so in the latter case the capacity of the conusor to levy the fine, is triable by the fine itself, and his capacity to acknowledge the warrant, is triable by a jury. From all which I am warranted to lay it down as a general position, that the capacity of a party to do one act, is not conclusive to his capacity to do another, if his capacity as to that other be triable by a different jurisdiction, whether the two acts make one and the same assurance, or are done at one and the same time or not.

It will then perhaps be asked what? and has the fine no operation? is it not even evidence? I answer that it has all the operation it was ever intended to have, it has made a good tenant to the *præcipe*, and has put the evidence of it on record: and if the plaintiff in error had assigned for error, that there was not a good tenant to the *præcipe*; he would have been concluded by the fine: and further, if the fine had been pleaded to the writ of error, as a fine with proclamations, upon which five years after the title accrued had run, without any claim, and that the plaintiff in error could not reply, that he had claimed within the five years, or that he came within the savings of the statute, he would in like manner have been

barred by the fine. But as the case is at present circumstanced, the fine proves nothing conclusively but its own existence. I say it proves nothing conclusively but that: but, when I say so, I would not be understood to mean, that it is not evidence to go to a jury; for, on the contrary, I think it is evidence, and evidence of the most persuasive nature, but especially when coupled with the inquisition and warrant of attorney: for though I cannot subscribe to the doctrine which the question seems to insinuate, that a legal conclusion admits of degrees of comparative strength, or that it is more or less conclusive at different times; and though I can no more admit that three pieces of evidence, none of which is conclusive in itself, do altogether amount to a conclusion, any more than I can, that three cyphers make a unit, yet I feel very sensibly that persuasive evidence may be more or less strong according to its nature, and that three pieces of evidence tending to establish one and the same fact, are stronger evidence, than one of them would be singly. And therefore, upon the whole, my answer to the second question is, that the inquisition, the fine, and the warrant of attorney, are not in any case which has been put singly, or altogether conclusive evidence, so as to warrant the judgment of the Court of King's Bench.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

CHAP. II.

How Intails of Copyholds may be barred, and Effect of Releases.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

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| § 1. <i>Alienation by Custom.</i> | 41. <i>Effect of a Surrender and Admittance.</i> |
| 4. <i>Surrender.</i> | 43. <i>The Admittance relates back to the Surrender.</i> |
| 17. <i>Who may Surrender.</i> | 47. <i>Surrender by way of Mortgage.</i> |
| 25. <i>To whose Use a Surrender may be.</i> | 55. <i>A Surrender will not destroy a Contingent Remainder.</i> |
| 29. <i>Presentment.</i> | 58. <i>Construction of Surrenders.</i> |
| 33. <i>Admittance.</i> | 77. <i>A Surrender is sometimes supplied in Equity.</i> |
| 37. <i>The Admittance must be according to the Surrender.</i> | |
| 40. <i>Who may admit.</i> | |

Section 1.

IT has been already shewn that copyholders being mere tenants at will, they cannot alien their estates by feoffment or other assurance at common law; but by the custom of all manors in which this kind of property is to be found, every copyholder has a power of transferring his estate to any other person, by sur-

Alienation by Custom.
Tit. 10. c. 3.
s. 50.

rendering or yielding it up to the Lord of the Manor, in trust that he may grant it out again to the person named in the surrender, which is therefore called an alienation by custom.

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§ 2. This practice is as ancient as the time of *Bracton*, who says of free copyholders—*dare enim non possunt tenementa sua, nec ex causa donationis ad alios transferre, non magis quam villani puri, et unde si transferre debeant, restituant ea domino vel ballivo, et ipsi ea tradunt aliis, in villenagium tenenda.*

§ 3. The process in most manors is, that the tenant surrenders his estate to the lord, in trust to be again granted by him to such persons, and for such uses, as are mentioned in the surrender. This surrender must be presented by the jury or homage of the manor, and found by them upon their oaths, and then the lord grants the land to the person named in the surrender, to hold by the ancient rent and customary services, and thereupon admits him tenant to the copyhold by the delivery of a rod, a glove, or the like, in the name of corporal seisin of the lands and tenements.

This mode of alienation therefore consists of three parts, the surrender, the presentment, and the admittance.

Surrender.

§ 4. A surrender is a yielding up of the estate by the tenant to the lord, for the purpose of being re-granted to some other person. The form of it is thus—*ad hanc curiam venit A. et sursum reddidit in eadem curia*

Tit. f. 74.

curia unum messuagium, &c. in manus domini, ad usum B. et heredum suorum.

§ 5. Lord Coke says, that the word, *surrender* is *vocabulum artis*, and therefore where a surrender is necessary, if this word be wanting all other words used in ordinary conveyances are insufficient to convey a copyhold estate; for as a copyholder is tied to a particular mode of conveyance, so he is restrained to a particular form of words. Cop. l. 39.

§ 6. A surrender must transfer the lands to the lord, otherwise it cannot have any effect, because the person to whose use the surrender is made must come in under the estate of the lord, and by a grant from him.

§ 7. Every copyholder may surrender his estate in court, without alledging any particular custom for it. So a copyholder may surrender to the lord himself, out of court, without a special custom. 1 Inst. 59 a.

§ 8. A surrender out of court to the steward of the manor is also good, by the general custom of all manors, though the steward be only appointed by parol. 4 Rep. 30 b.

§ 9. A surrender out of court by the hands of two or three tenants of the manor, or by the hands of the bailiff or Reeve, or of any other person, must be warranted by a special custom, and particularly pleaded. 1 Inst. 59 a.

Parker v.
Kett,
1 Ld. Ray.
658.

§ 10. A surrender of a copyhold to the deputy of a deputy steward, out of court, is good, because he is a steward *de facto* at the time.

Co. Cop.
f. 34.
Combe's Case,
9 Rep. 75.

§ 11. A copyholder may surrender in court by attorney, without a special custom to warrant it; for he may surrender by the general custom of *England*, which is the common law, and then it is incident to do it by attorney.

9 Rep. 76 a.

§ 12. A copyholder cannot, however, surrender into the hands of two tenants by attorney, for such surrender, though in person, is not warranted without a special custom.

9 Rep. 76 b.

§ 13. An attorney who makes a surrender ought to pursue the usual form, as by the rod, &c. according to the custom of the manor: and he ought to make it in the name of his principal, not in his own name; or shew his authority, and say he surrenders it by force of such authority.

§ 14. A purchaser of a copyhold is, however, not obliged to accept of a surrender by letter of attorney.

Mitchel v.
Neale,
2 Ves. 679.

§ 15. Upon a bill for specific performance of an agreement for sale of copyhold lands, the defendant insisted upon making the surrender by attorney, and not otherwise, and that he was ready to do so. The plaintiff insisted on his doing it in person, and entered into proof that the custom of the manor was, that whoever wanted to surrender must, unless in special cases

cases of disability, do it in person. By a decree at the Rolls a trial was directed as to this custom. On an appeal to Lord *Hardwicke* the decree was affirmed, because no court of justice will compel a purchaser to accept of a doubtful title.

§ 16. Lord *Hardwicke* held there was no necessity of a declaration of the uses of a surrender in the court roll; and that where the steward indorsed the uses on the back of the surrender, it was sufficient. 1 Atk. 74.

§ 17. All persons who are capable of conveying their estates by any common law assurance, are also enabled to surrender their copyhold estates. Who may surrender. Co. Cop. f. 34.

§ 18. By the general custom, a husband and wife may surrender the wife's copyhold, provided the wife is privately examined by the steward. And where there is a special custom to warrant it, a surrender by the husband and wife made out of court upon an examination of the wife, before two tenants of the manor is good. Gilb. Ten. 277. 312.

Erish v. Rives,
Cro. Eliz. 717.

§ 19. But a custom for a married woman to surrender her copyhold lands, without the assent of her husband, is void: because it is contrary to the general law and policy of the nation; and would tend to render wives independent of their husbands.

§ 20. *Frances* the wife of *William Geary* being entitled to a copyhold estate, which had descended to her from her father, was admitted, and being privately examined, Stephens v. Tyrrell, 2 Wils. Rep. 1.

examined, surrendered the estate to the use of herself for life, with remainder over. After several arguments the court was clearly of opinion that this was a bad custom.

**Compton v.
Collinson,
1 H. Black.
R. 334.**

§ 21. But where a married woman lived separate from her husband, under articles of separation, by which he covenanted that she should enjoy to her own use all such estates both real and personal as should come to her during the coverture, and that he would join in the necessary conveyances to limit them to such uses as she should appoint. Afterwards copyhold lands having descended to the wife, the husband again covenanted in the same manner as before that he would join in surrendering such estates to such uses as his wife should appoint. It was held by the court of Common Pleas that a surrender by the wife alone was good, although there was no special custom to authorize it.

**Goodtitle v.
Meyse,
3 Term Rep.
865.**

§ 22. A mere possibility cannot be surrendered; and therefore it was resolved in a late case, that a surrender by the heir apparent of a copyholder, in the lifetime of his ancestor, had no effect whatever; and did not even operate as an estoppel, though the heir survived his ancestor.

§ 23. Nothing can be surrendered but a legal estate; it is not however necessary that such legal estate should be in possession, it is sufficient if it be vested; and therefore an estate in remainder or reversion may be surrendered.

§ 24. It

§ 24. It follows from this principle that an equitable interest in a copyhold may be transferred from one person to another, without a surrender, for otherwise it would be unalienable.

§ 25. A copyhold estate may be surrendered to the use of any person capable of taking an estate by a common law conveyance; and also to some persons not capable of taking by such assurances.

To whose Use a Surrender may be.

§ 26. Thus a copyhold may be surrendered to an infant *in ventre matris*; and a husband may surrender a copyhold to the use of his wife, of which the reason will be given hereafter. A person may also surrender a copyhold to the use of his last will.

Co. Cop.
f. 35.
4 Rep. 29 b.
Tit. 38. c. 3.

§ 27. In grants at common law, if the grantee be not in *rerum natura*, and capable of taking at the time when the grant is made, it is merely void. But in the case of surrenders, the law is otherwise, for though at the time of the surrender the grantee is not *in esse*, or not capable of a surrender, yet if he be *in esse* and capable at the time of the admittance, that is sufficient: and, therefore, a surrender to the use of him who shall be heir to J. S., or to the use of J. S.'s next child, or to the use of J. S.'s wife, though at the time of the surrender J. S. had no heir, child, or wife, yet if afterwards he hath a child, or taketh a wife, his heir, his child, or his wife, may come into court, and compel the lord to admit according to the surrender.

Co. Cop. f. 35.

Lord Coke says, the reason of the law is this, a surrender is a thing executory, which is executed by the subsequent

Idem.

subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and, therefore, if at the time of the admittance the grantee be in *rerum natura*, and able to take, that will serve.

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§ 28. Lord Chief Baron *Gilbert*, in his *Treatise of Tenures*, observes, that this doctrine seems to be reasonable, and to carry no inconvenience with it, for it is not like a grant at common law; for there, if there be nobody to take, the grant is void, because the estate must be somewhere, and the grant puts it out of the grantor. But in case of a surrender, there is no inconvenience at all, for the surrenderee hath nothing till admittance, but the estate is in the surrenderor. But then it seems, that if the surrenderee be not *in esse* before the admittance, that the surrender will be void, for this seems to be implied by Lord *Coke*; for he says, that if, at the time of the admittance, the grantee be in *rerum natura*, that will serve, which implies that the admittance is to be made after the usual manner, not that the admittance shall be put off till there be such a person: for, if the person to whom the surrender was made should never come *in esse*, then the admittance time would be eternally put off, the old surrender would stand good, and nobody be able to dispose of the copyhold estate,

Presentment.

§ 29. By the general custom of copyholds, all surrenders made in court must be presented by the homage or jury; and where surrenders are made out of court, they must be presented at the next court which
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is held after such surrender is made ; but, in some manors, more time is allowed for presenting surrenders. 2 Vef. 302.

§ 30. It seems that presentment of a surrender in court is only by way of instruction, to give the lord notice of the surrender. But a presentment is not of absolute necessity ; for if the lord does not require a presentment to be made, and proceeds without it, any subsequent act of his which shews his assent to the surrender will be sufficient. Gilb. Ten. 278.

§ 31. A surrender is good, though the surrenderor should die before it is presented ; provided it be presented within the time required by the custom. And so it is if the persons to whom the surrender is made die before presentment. 1 Inst. 62 a.
4 Rep. 29 b.

§ 32. Copyhold lands were surrendered to two tenants out of court, who died before presentment ; it was held that the surrender was good, and might be presented at the next court, by any other copyholder of the manor. Forcel v. Welsh,
Cro. Ja. 493.

§ 33. When a surrender is duly presented in court by the homage or jury, the lord, by his steward, grants the copyhold so presented to the person to whose use it was surrendered ; and, thereupon, admits him tenant to the copyhold, and the admittance is entered on the court-rolls of the manor. Admittance.

Lit. f. 74.

The entry of the admittance in the court-rolls is thus; *et super hoc venit prædictus B. et cepit de domino in eadem curia messuagium prædictum, &c. habendum, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, et admissum est.*

Gilb. Ten.
282.

§ 34. The acceptance of the new tenant by the lord, constitutes the essence of an admission, all the rest is mere form; and, therefore, any act of the lord shewing his consent to the surrender, amounts to an implied admittance; but still the admission must be regularly entered on the court-rolls.

§ 35. But the mere acceptance of a surrender by the steward, and the entry thereof in the court-rolls, with the delivery of a copy of such entry to the surrenderee, will not amount to an admittance.

Rawlinson v.
Green, Poph.
127. Bridg.
81.

§ 36. A copyholder surrendered out of court, according to the custom of the manor, and the surrender was presented at the next court, and an entry thereof made by the steward thus, *compertum est per homagium, &c.* but there was no admittance. It was determined, that this entry on the rolls did not amount to an admittance. 1st, Because the acceptance of the presentment by the steward from the homage was no more than what he was bound to do, as being judge of the court. 2d, Because the entry of it on the roll was but an office of duty, being but evidence to the court, as also to him to whose use the surrender was made; and so was the delivery of the copy to the surrenderee. But none of these things did imply the
consent

consent of the lord, that the *cestui que use* should be admitted to have the land according to the surrender; and all these things together did not imply an admittance, for all of them might be done though no admittance were in the case.

§ 37. As the lord has only a customary power to make admittances, according to the terms of the surrender, and is nothing more than a mere instrument, it follows, that 'if there be any variance between the admittance and the surrender, either in the person, the estate, or the tenure, or in any other point, the admittance is good, so far as the lord has executed his power; but where he exceeds it, he acts without authority, and, therefore, the excess is void.

The Admittance must be according to the Surrender. Co. Cop. f. 41.

§ 38. Thus, Lord *Coke* says—If *A.* surrenders to the use of *J. S.* for life, and the lord admits him in fee, an estate for life only passeth; so if I surrender without mentioning any certain estate, because, by implication of law, an estate for life only passeth, though the lord doth admit in fee, no more doth pass than the implication of law will warrant. If I surrender with the reservation of a rent, and the lord admits, not reserving any rent, or reserving a less rent than I reserved on the surrender, this admittance is wholly void. But if the lord reserves a greater rent, then is the reservation void only for the surplussage, and the admittance so far current as it agreeth with my surrender. If I surrender upon condition, and the lord omits the condition, the admittance is wholly void; but if my surrender be absolute, and the lord's admit-

Co. Cop. f. 41.
4 Rep. 29.

tance be conditional, the condition is void, but the admittance, in all points else, is good.

2 Term. R.
484.

§ 39. A *mandamus** will be granted by the Court of King's Bench to compel the lord to admit a person to whom a copyhold has been surrendered.

Who may
admit.
Tit. 10. c. 2.
l. 4.

§ 40. We have seen, that in the case of voluntary grants of copyholds, every lord of a manor *pro tempore* may make such grants, and admittances in consequence thereof: but, in the case of admittances upon surrenders, this doctrine is carried still farther, because the lord is only deemed an instrument to admit the *cestui que* use, and no more passes to the lord than is necessary to serve the limitation of a use; so that no respect is had to the quantity or quality of his estate in the manor; for whether it be right or wrong, admittances made by him can never be called in question, on account of any defect in his title, because they are judicial acts which every lord is bound to do.

1 Inst. 59 b.
4 Rep. 27 b.
Co. Cop. l. 41.

Effect of a
Surrender and
Admittance.

§ 41. A surrender and admittance, when made pursuant to the custom, operate as effectually in transferring a copyhold estate, as a feoffment or any other common law conveyance can operate in transferring an estate of freehold.

Co. Cop. l. 39.

§ 42. It is laid down by Lord Coke, that a surrender, where, by a subsequent admittance, the grant is to receive its perfection and confirmation, is rather a manifesting of the grantor's intention, than of passing away any interest in the possession; for, till admittance, the

law

law taketh notice of the grantor as tenant, and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord, yet the interest is in him but *secundum quid*, and not absolutely, for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender; neither in the grantee is any manner of interest invested before admittance, for if he enter, he is a trespasser, and punishable in trespass; and if he surrender to the use of another, the surrender is merely void, and by no matter *ex post facto* can be confirmed. But though the grantee hath but a possibility upon the surrender, yet this is such a possibility as is accompanied with a certainty; for the grantee cannot possibly be deluded or defrauded of the effect of his surrender, and the fruits, of his grant; for if the lord refuse to admit him, he is compellable to do it by a *subpœna* in the Chancery; and the grantor's hands are ever bound from the disposing of the land any other way, and his mouth ever stopped from revoking or countermanding his surrender.

§ 43. This doctrine has been in some degree altered by determinations, in which it has been established, that the surrender is the substantial part of the conveyance, and a complete execution of the contract. as between the vendor and vendee; that the admittance must be pursuant to the surrender, and, consequently, must relate to it, so that the estate of the surrenderee is complete to many purposes before admittance.

The Admittance relates back to the Surrender.

1 Inst. 59 b.
Porter v.
Porter, Cro.
Ja. 100.

§ 44. Thus, Lord *Coke*, in his Comment on *Littleton*, says, if two joint-tenants be of copyhold lands in fee, and one out of court, according to the custom, surrenders his part to the use of his last will, and devises it to a stranger in fee, and dies, and at the next court the surrender is presented, by the surrender and presentment, the jointure was severed; for, by relation, the state of the land was bound by the surrender.

§ 45. This doctrine is fully confirmed by the following case.

Vaughan v.
Atkins,
5 Burr. 2764.

Richard Kent being seised in fee of the premises in question, held by copy of court-roll according to the custom of the manor, but not expressed to be at the will of the lord, contracted to sell the same for a valuable consideration to *John Atkins*, and surrendered them out of court to the use of said *John Atkins* and his heirs, who entered into possession. *John Atkins* died without being admitted, and before the surrender was presented, no court having been held until after his death. The custom of the manor, with respect to the widow's estate, was, that if the husband died seised, his widow had a right to be admitted to the land as her free-bench, during her widowhood. The question was, whether, in this case, the widow of *John Atkins* was entitled to her free-bench?

It was argued for the heir at law of *John Atkins*, that the custom under which the widow claimed, and which was free-bench, was considered by all authorities, particularly *Hobart* 181. as a part fruit or excrescence out of the estate of the husband; it was, in

fact, the estate of the husband, which, for the benefit of the widow, was said to have continuance after his death, for a period of time described by the particular customs of particular manors; in some, during the widow's life, in others, during her widowhood only. To have continuance, it must first exist; but it does not exist till the husband is a complete copyholder; and he is not a complete copyholder, till, in the language of the customs, he is seised. For the true idea of seisin, resort must be had to the ancient system of feudal tenures; by that system, seisin was a technical expression to describe the completion of the investiture by which the tenant was admitted into the tenure, and, without which, no freehold could be constituted or pass; *sciendum est, feudum sine investitura nullo modo constitui posse.* Without this seisin, nothing more than a naked possession was acquired. In the conveyance of freeholds, where it was by feoffment, the investiture was completed by livery. In the conveyance of copyholds, after surrender, it was completed by admittance; and no case was to be found, where admittance was not deemed as necessary to complete the investiture, in the conveyance of a copyhold, as livery was of a freehold, where it passed by feoffment; or as in-rollment, where it was conveyed by bargain and sale. Upon these principles, therefore, that no estate of this sort could pass unless the investiture was completed, and that the investiture could not be completed without admittance, it was insisted, that *John Atkins* did not die seised, and, therefore, that his widow was not within the custom; that she had no right to be admitted under it, and, for that reason, could have no right to retain the premises against the heir.

On the other side, it was contended for the widow, that if the death of *cestui que use* before admittance does not alter the nature of the estate, transferred by the surrender, the widow must have the same title as if the husband had been admitted; and if the admittance has a relation to the time of the surrender, in all respects, and even so far as to defeat all mesne acts between the surrender and admittance, it will follow, that the admittance of the heir must have relation back to the time of the surrender, so as to give the *cestui que use* a complete title, and to give his estate all the incidents which would have accompanied it, if they had happened at the same moment; and, consequently, that the widow, who would have been entitled if they had in fact so happened, should have a right to the fiction of law, especially against the heir.

Lord *Mansfield* said, the question was, whether the heir of the surrenderee, who dies before admittance, shall avoid the free-bench or customary dower of the widow, because he died before admittance. In this case, the contract was for a purchase and sale. The surrender is the substantial part of the conveyance, and a complete execution of the contract as between the vendor and the vendee. The surrender and the admittance are different parts of the same conveyance. The formal effectuates the substantial part, and, therefore, must relate to it; both together make but one conveyance. The admittance must be pursuant to the surrender, and, consequently, must operate as from the date of it.

Surrender to A.—Before admittance surrenderee dies, A. is afterwards admitted. A. shall avoid the free-bench of the widow of the surrenderor; for A.'s admission has relation to the surrender.

Benson v. Scot, 3 Lev. 385. 1 Salk. 185. Tit. 10. c. 3. f. 39.

If one joint-tenant surrenders to the use of his will, his devisee shall take, for the admittance relates to the surrender, and from that time severs the joint-tenancy.

1 Inst. 59 b. Ante f. 44.

It is laid down that the lord is only an instrument; that after admittance, the surrenderee is in by him who made the surrender. That although the surrenderor or the tenant by whose hands the surrender was made die, yet presentment and admittance afterwards is good; and where he to whose use the surrender is made, before admittance, dies, his heir shall be admitted. The true reason is drawn from the context, and given in *Bacon's Abridgement*. "For, upon admittance, the estate is in *cestui que* use from the time of the surrender by relation."

4 Rep. 49 b.

Tit. Cop. (G. f. 8.)

Moore's case Trin. 40 Eliz. referred to by Justice *Newdigate* in the case of *Blunt v. Clarke*, is not stated, nor does it appear what the question was. The proposition in *Roll's Abridgement*, "that the heir being admitted is in by the lord, and not by him that made the surrender," is contrary to truth, and all the authorities. The lord is a mere instrument, and cannot vary from the surrender; and, in the same case of *Blunt v. Clarke*, reported afterwards in the same book, *Glynn* Chief Justice says, "if a man seised of copyholds in borough *English* surrenders to the use

2 Sid. 38.

Vol. 1. 627. pl. 9.

2 Sid. 61

Pa. 288.

“ of *Y. S.* and his heirs, and *Y. S.* dies before admit-
 “ tance, leaving two sons, the younger of them shall
 “ have the land, because he is in by descent, or at
 “ least by force of the first surrender, and so in nature
 “ of a descent.” And it is said in the *Treatise of*
Tenures ascribed to Lord Chief Baron *Gilbert*, and I
 suppose written by him, “ That this opinion seems
 “ very reasonable, for heirs was certainly there a word
 “ of limitation, and not of purchase; and, certainly,
 “ there is as much reason to adjudge the heir in by
 “ descent here, as there is to adjudge an heir in by
 “ descent, where a recovery was had against the an-
 “ cestor, but not executed till after his death, because
 “ the use might have vested during the life of the an-
 “ cestor, and because the execution hath a retrospect.
 “ And, in truth, the case of a surrender is just the
 “ same, for admittance might have been in the life of
 “ the ancestor; and when it was had, it had a retro-
 “ spect.” And, in the margin, he refers to *Shelley's*
 case in 1 *Rep.* 106. where the opinion was, that the
 execution had a retrospect to the recovery,

With this reasoning we agree, and are of opinion,
 that, upon admittance, the heir is in by descent, from
 the surrender to which the admittance relates.

The lessor of the plaintiff, in this case, is expressly
 admitted as heir; the law casts the free-bench upon
 the widow, just as it casts the descent upon the heir.
 The admittance, by relation, makes her husband seised
 from the date of the surrender.

There

There is no rule better founded in law, reason, and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation. Livery relates to the feoffment; inrollment to the bargain and sale; a recovery to the deed which leads the use; so admittance shall relate to the surrender, especially when it is a sale for a valuable consideration, as in this case.

The title is not complete till admittance, and to the lord it is material, in respect of his fine; but as between the parties, the vendor and vendee, the admittance is mere form. The agreement is executed, and the land bound by the surrender, the lord is compellable by *mandamus*, or decree, to admit. The vendor, his widow, his heir, and all claiming under him, are concluded from saying after admittance, that the land did not pass from the day of the surrender. Upon this ground the lessor of the plaintiff claims the inheritance whereof his brother died seised; it shall not be in his mouth to say against the widow, that his brother did not die seised. Therefore let judgment be for the defendant the widow.

§ 46. The law laid down by Lord *Mansfield* in the preceding case has been fully confirmed by a late determination of the Court of King's Bench, in which it was held, that the title to copyhold lands relates back from the time of the admittance to the surrender, as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor, on a

Holdfast v. Clapham,
1 Term. Rep.
600.

demise laid between the times of surrender and admittance.

Surrenders,
by Way of
Mortgage.
Wade's Case,
5 Rep. 114.

§ 47. Copyhold estates may not only be surrendered to the use of another person, absolutely, but also upon condition that if the surrenderor pay the surrenderee a particular sum of money on a given day, the surrender shall be void; and in all cases of this kind the surrenderor continues to be the legal tenant till the mortgagee is admitted.

Doe v.
Woot,
5 East's Rep.
132.

§ 48. It is said by Lord *Hardwicke* that mortgages of copyholds were constantly made in the following manner. A conditional surrender was made, and if that surrender was not presented, the general custom of the manor being that it became void, a new surrender was made, and the Lord did not become entitled to a fine on these surrenders, because they were only intended as a pledge for securing the payment of the money advanced.

Skin. 142.

Doe v.
Morgan,
7 Term Rep.
103.

§ 49. If the person to whose use the surrender is made, is admitted, he acquires the legal estate, and therefore, upon payment of the money, he must surrender back the premises to the mortgagor.

Fawcett v.
Lowther,
2 Vef. 300.

§ 50. In the case of a mortgage of a copyhold, the equity of redemption will follow the custom, as to the legal estate, as it does in borough *English* lands, which, if mortgaged, the equity of redemption will descend to the youngest son, to whom the lands will descend.

§ 51. Although

§ 51. Although a surrender by way of mortgage be not presented, yet it will be a lien on the estate in equity, and will be good against the assignees of a bankrupt.

§ 52. One seised in fee of a copyhold, made a mortgage of it to J. S. but the surrender was not presented at the next court, by means whereof it became void, and afterwards the mortgagor who had continued in possession became a bankrupt. And though on a dispute between the mortgagee and the creditors, it was objected that it was the mortgagor's own fault, that he did not procure the surrender to be presented, and that this was probably with an ill intent, namely, to wrong the lord of his fine; that the copyholder being in possession, and the visible owner of the estate, this might, and in all likelihood did, induce his creditors to trust him, as thinking his estate would be liable to their debts; that it was reasonable all the creditors of the bankrupt should come in equally, and the mortgagee only for his proportion, his mortgage being void at law, and consequently liable to the bankruptcy, and that equality was the highest equity; yet it was decreed on great deliberation, that this mortgage, though void at law, was notwithstanding an equitable lien upon the copyhold estate, and should be made good in equity, and bind the assignees of the commission of bankruptcy and all the creditors.

Taylor v. Wheeler,
2 Vern. 564.
1 P. Wms.
279.
Tit. 15.
ch. 5. §. 21.

§ 53. A mortgagee of a copyhold will not be allowed to tack a judgment debt to that due upon the mortgage;

Tit 14. f. 39. mortgage; because copyhold lands are not subject to an execution upon a judgement.

Cannon v.
Pack,
6 Vin. Ab.
222.

§ 54. Upon a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest due upon the mortgage, the defendant insisted to have a judgment which had been assigned to him first satisfied, before the plaintiff should be let in to redeem. But Lord *Harcourt* said that copyhold lands were not liable to a judgment, and therefore the judgment should not be tacked to the mortgage in this case. But the plaintiff should redeem upon payment of what was due upon the mortgage, without satisfying the judgment.

A Surrender
will not de-
stroy a Con-
tingent
Remainder.
Ferne Con.
Rem. 469.

§ 55. The surrender of a copyhold estate will not destroy a contingent remainder limited thereon, because the legal freehold which is in the lord will support it.

Mildmay v.
Hungerford,
2 Vern. 243.

§ 56. Thus where copyhold estates were devised to *A.* for life, remainder to his first and other sons in tail, &c. remainder to *B.* in fee. *A.* before he had any sons born bought the reversion of *B.* and had it surrendered to his (*A.*'s) own use, thinking by that means to merge his estate for life, and so destroy the contingent remainder to his first son. But however it was agreed that this surrender of the reversion would not bar the son; because the freehold and inheritance were in the lord; for there is not the like inconvenience, as in freehold estates in common law, in respect of contingent remainders, where there is nobody against whom to bring the *præcipe*.

§ 57. Lord

§ 57. Lord Ch. Baron Gilbert says, "Copyholder for life, remainder to another in fee, the first copyholder commits a forfeiture, he in remainder shall not enter, but the lord shall hold it during the life of the first copyholder; for copyhold estates are not like those at common law, for in copyhold cases the remainder is to commence after the death of the tenant for life, and not after his estate or interest is gone."

Ten. 244-265.

Vide Fearn v. Con. Rem. 471.

§ 58. The construction of a surrender, or rather of the uses which were declared in the surrender, was not formerly so strict as that of a common law conveyance, especially where there had been a custom in the manor of construing surrenders in a particular manner.

Construction of Surrenders.

§ 59. Thus, although the surrender be general, the surrenderee will only take an estate for life. But if there be a special custom in a manor, that the words *sibi et suis*, or, *sibi et assignatis*, &c. shall create an inheritance, they will be allowed to have that effect.

Co. Cop. f. 49.

Bunting v. Lepingwell, 4 Rep. 29 a, Gilb. Ten. 258.

§ 60. A custom that where a copyholder surrenders to the use of another, without expressing any estate, the lord may grant it in fee to the person, to whose use the surrender was made, was held to be good. For the interest of the land being between the lord and the copyholder, it was not unreasonable that upon such an uncertainty, the lord should ascertain it.

Brown v. Foster, Cro. Eliz. 392.

Co. Cop.
f. 49.

§ 61. Lord *Coke* says, if a copyhold be surrendered to a man, *et semini suo hereditabili de corpore*, or to a man, *et heribus ex ipso procreatis*, or to a man in frank marriage with his wife, an estate tail will pass, in the first, without the word *heirs*, in the second without the word *body*, and in the third without either.

Spargoed v.
Hone,
Cro. Car. 366.

§ 62. It was however resolved in the reign of *Charles I.* that an estate tail should not arise by implication, upon a surrender of a copyhold. As where a copyholder surrendered to *A.* and *B.* and the longer liver of them; and for want of issue of the body of *A.* the lands to remain to the son of *J. S.* It was resolved that *A.* had but an estate for life, and being so by express limitation, no greater estate should arise to him by implication.

1 P. Wms.
14.
Tit. 32.
ch. 24. f. 48.

§ 63. In the case of *Fisher v. Wigg*, Justice *Gould* said, that surrenders of copyhold land to uses shall have the same favourable construction as wills, and are not to be tied up to the strict rules of the common law, but expounded according to the intent of the party. This principle was opposed by Lord *Holt*, who held that surrenders of copyholds must be governed by the same rules as conveyances at common law.

1 P. Wms. 70.
2 Ld. Raym.
1144.

In the case of *Idie v. Cook* which arose a few years after, Lord *Holt* and the other Judges appear to have agreed in the opinion, that the construction of a surrender ought to be the same as that of a feoffment or any other deed. And Justice *Powell* said, “We have gone too far already, in helping the intention of the parties, in construction of limitations, and have made

“ made estates so uncertain, that lawyers do not know
 “ how to advise purchasers ; I cannot consent to carry
 “ it any farther.”

This doctrine has also been laid down by Lord *Hardwicke*, who has said that surrenders of copyholds are to be construed as deeds and conveyances at common law, and not as a will.

Lovell v. Lovell,
 3 Atk. 11.

§ 64. The construction of surrenders is however so far similar to that of wills, that the word *or*, will be construed *and*, in order to effectuate the intention of the parties.

§ 65. A person surrendered a copyhold to the use of himself for life, and from and after his decease, to the use of his wife during her widowhood, and after his decease, and upon the marriage of his wife, then to the use and behoof of *William Wallis*, for his natural life, and from and after his decease, to the use of the issue of his body lawfully to be begotten ; with a proviso that in case *William Wallis* should die in the lifetime of the surrenderor, *or* without issue of his body, then all the surrendered premises should go to the right heirs of the surrenderor for ever. *William Wallis* died in the lifetime of the surrenderor, leaving issue, who brought an ejectment ; and the question was, whether they were entitled to this copyhold.

Wright v. Kemp,
 3 Term Rep.
 470.

Lord *Kenyon* said the questions were, what was the intention of the parties to the surrender ; whether they had expressed it in legal terms ; and if so, whether
 any

any rule of law would be violated in giving effect to it? There was no doubt but that a surrender was considered as a common law conveyance, and was not entitled to the same favourable construction as a will. And therefore unless the surrenderor had used the language which would confer a legal estate, it could not be conferred. In deeds certain legal phrases must be used, in order to create certain estates; as the word *heirs*, to create a fee, and *heirs of the body*, to create an estate tail. But beyond that he would say with Lord *Hardwicke*, that there was no magic in particular words, further than as they shew the intention of the parties. Now here it was impossible to entertain any doubt. *S. Burrill* surrendered the estate to the use of himself for life, then to his wife during her widowhood, then, that is in case her estate for life was put an end to by doing this act, which he meant to guard against, to her son *W. Wallis* for life, and after his decease, to the issue of his body. Therefore he could not accede to what was said by the defendant's counsel, that this was a contingent remainder in *W. Wallis*; for it was vested, though he cautiously avoided saying what the limitation to his issue was. The surrender then proceeded to state a proviso, that in case *W. Wallis* should die in the lifetime of the surrenderor, or without issue of his body, the estate should go to the right heirs of the surrenderor: and here the question arose on the word *or*. Now there was no doubt on the intention of the parties, and where sense required it, there were many cases to shew that the court might construe the word *or* into *and*, *and*, and into *or*. 2 *Str.* 1175. 3 *Atk. Rep.* 390. in order

order to effectuate the intent of the parties. Here therefore in order to give effect to the intention of the surrenderor the court must say, that when he used the word *or*, he meant *and*. And there was no case in which any difference had been made, as to this point between a will and a deed, when the court were considering how the intention of the parties could be effected. Then without deciding what interest the lessors of the plaintiff had, at all events they had a sufficient title to maintain this ejectment.

§ 66. The rule established in *Shelly's* case takes place in the construction of surrenders, and therefore where a person surrenders to the use of himself for life, remainder to another in tail, remainder to his own right heirs, there the heirs shall take by descent.

Vide Tit. 32.
ch. 25.
Gilb. Ten.
270.
Fearne Con.
Rem. 79.
Allen v.
Palmer,
1 Leon. 101.

§ 67. Mr. *Fearne* observes, that in a case noticed by *Atkyns* upon a surrender of a copyhold to the use of the husband for life, then of the wife for life, and of the heirs of the bodies of the husband and wife, remainder in fee to the use of the survivor, it is said the limitation did not vest an absolute estate tail in the wife who survived, but only gave her an estate tail after possibility of issue extinct, and that the estate tail vested in the person who was heir of the bodies of both husband and wife. That the reasons for this opinion are not mentioned, nor was it stated to be the resolution of the court, nor did it appear whether that point entered the question then before the court.

Cont. Rem.
80.
Sutton v.
Stone,
2 Atk. 101.

And

And that it is no easy matter to account for such an opinion.

The limitation to the heirs of the bodies of the baron and feme must either have been executed in the baron and feme jointly, as an estate tail in possession, or have vested in them jointly, as a remainder; unless it would have been held a contingent limitation to the heir of both their bodies; in neither of the two first cases could the wife be tenant in tail after possibility of issue extinct, so long as any issue of her body by her deceased husband was living, and if there was any such issue then living, it could not vest in such issue till her death. In the third case she could take no estate tail at all, and consequently could not be tenant in tail after possibility of issue extinct. The only cases in which she could be tenant in tail after possibility of issue extinct, were, those two in which it was impossible there should then be any such person as the heir of both their bodies. The question being upon a surrender of a copyhold made no difference in the construction; as it was agreed in the same case that surrenders of copyholds should be construed in the same manner as conveyances at common law. Now under a similar limitation at common law, he apprehended, the husband and wife, taking distinct and successive estates for life, the joint limitation to the heirs of their bodies would not have been executed in them in possession, but would have been vested in them jointly, as a remainder in tail; that this remainder surviving to the wife, upon the decease of her husband, would have merged her estate for life, so

as to make her tenant in tail in possession; but she having had no issue by her deceased husband, or such issue being then extinct, would thereby have become only tenant in tail after possibility of issue extinct.

§ 68. *Charles Aistrop* the father, being seised in fee of a freehold estate, and also of the premises in question, being copyhold of inheritance descendible to the youngest son, settled his freehold previous to his marriage to the use of himself and *Ann* his intended wife for their lives and the life of the survivor, and after their decease to the use of the heirs of the body of the said *Charles* on the body of the said *Ann* to be begotten, with remainder to his own right heirs. And also covenanted to surrender his copyhold, "To the use
" of himself and his said intended wife and the heirs
" of their two bodies to be begotten in like manner,
" and to the same uses as the freehold lands and
" tenements therein before mentioned were settled
" and conveyed." The copyhold was surrendered to the use of the husband and wife for their lives and the life of the survivor, and after their several deceases to the use of the heirs of their two bodies lawfully begotten or to be begotten, and for want of such issue to the husband, his heirs and assigns for ever. The husband and wife were admitted accordingly, and died leaving issue two sons.

Roe v.
Aistrop,
2 Black. Rep.
1228.

The question was to which of the sons the copyhold went. Lord Ch. Just. *De Grey* said it was a mighty clear case. There was reason indeed to suppose that the parties might not mean the two estates to go in a

Tit 32. c. 25.
f. 41.

different channel; but this was only a supposition, and if certain, still as this was a legal estate, it was not in the power of the parties to alter the legal course of descent. It was an estate executed, and seemed to be an estate tail in the father and mother. Had it been executory and upon articles, then according to Lord *Hardwicke's* doctrine, in the case of *Roberts v. Kingley*, the court might have considered the word *heir* as a word of purchase, but in the present case it was impossible. Sir *William Blackstone* said he thought the freehold was clearly vested in the father only, in special tail, the copyhold in both father and mother. So far there was a difference made in the outset, notwithstanding the words in like manner, &c. he conceived there appeared no intention in favour of either son exclusively, they were left to the disposition of the law. The heir was intended to succeed, but who that heir should be, must be left to the legal course of descent; in the freehold it was the eldest son, in the copyhold the youngest, and had there been only two daughters, both would have succeeded in both. In like manner only meant that both estates should be intailed.

Judgement for the youngest son.

Cont. Rem.
84.

§ 69. Mr. *Fearne* has observed on this case, that it related to an actual legal settlement before marriage, in respect to the freeholds; and, therefore, the limitation of those lands was not open to the construction of articles, to be carried into strict settlement. And the settlement of the copyhold, though resting in the covenant

covenant for surrender, seemed intimately blended with that of the freehold, as part of one and the same settlement; besides, that the limitations of the surrender agreed upon, were expressly referred to the same manner and uses, as the freeholds were settled, and therefore could not, consistently, with the express terms of such a stipulation, be limited in strict settlement on the issue as purchasers, when the settlement of the freeholds gave an estate-tail to the parent. And there was no other construction by which the descent of the lands to the youngest son could be avoided. This took it out of the authority of the cases where marriage-articles were carried into execution by way of strict settlement, and accounted for the distinction by the Chief Justice, between this case, as of an estate executed, and one executory on articles.

Tit. 32. c. 25.
f. 35.

§ 70. Where an estate for life is limited either to the father or mother only, and the subsequent limitation is to the heirs of both their bodies, the construction is the same in regard to copyholds as to freeholds, namely, the subsequent limitation does not vest in the ancestor taking the estate for life, but is a contingent remainder to the heirs of the bodies of both father and mother,

Ferne Cont.
Rem. 85.

Tit. 32. ch. 25.
f. 15.

§ 71. A person surrendered copyhold lands, to the use of *D.* and of the wife of *A.* for their lives, and afterwards to the use of the heirs of the bodies of *A.* and his wife; upon a question in ejectment, whether this subsequent limitation to the heirs of the body of

Lane v.
Pannel,
1 Roll. Rep.
238.

A. and his wife, vested an estate-tail in the wife of *A.*, it was held that it did not, but was a contingent remainder to the heirs of both their bodies.

Frogmorton
▼ Wharrey,
2 Black. R.
728.

§ 72. *John Robinson* surrendered a copyhold estate *ad opus et usum Mariæ Arnall* (quam in uxorem ducere intendit) et hæredibus eorum duorum corporum legitimè procreatis, et pro defectu talis exitus, ad opus et usum rectorum hæredum prædicti *Johannis Robinson.* *Mary Arnall* was admitted, *tenendum sibi et hæredibus eorum duorum corporum legitimè procreatis*; remainder to the right heirs of *John Robinson.* The Court of Common Pleas was of opinion, that the wife took only an estate for life, with a contingent remainder to the heirs of the bodies of the husband and wife.

1 Leon. 111.

§ 73. In the case of *Allen v. Palmer*, Lord Coke held, that where a person surrendered a copyhold to the use of himself for life, remainder to another in tail, remainder to the right heirs of the surrenderor, there his heirs shall be in by descent; contrary where the surrenderor hath not an estate for life or in tail limited to him, for there his heir shall enter as a purchaser, as if such use had been limited to the right heirs of a stranger, which is contrary to the rule in freeholds; for, in that case, where the estate moves from the grantor, the ultimate limitation to his heirs general, though the ancestor takes no preceding freehold, will be a reversion in him, and part of the old estate, and the heir will take it by descent.

Tit. II. ch. 4.
f. 26.

§ 74. Mr. *Fearne* has observed, that the only ground upon which he could account for Lord *Coke's* opinion, was, the supposition that an entire new estate was created and derived under the uses of the surrender, throughout the whole of them, and that no estate taken under those uses is any part of the old estate; but this notion has been entirely exploded by modern decisions.

Cont. Rem.
87.

Gilb. Ten.
272.

§ 75. *Blackwell North* surrendered a copyhold to the use of himself and his heirs till the solemnization of his marriage, then to the use of himself for life, remainder to his wife for life, remainder to trustees to preserve contingent remainders, remainder to the children of the marriage in such manner as *B. N.* should appoint; in default of appointment, to the heirs of the body of *B. N.* by his intended wife, and in default of such issue, to the said *B. N.* his heirs and assigns for ever. Lord *Mansfield* held, that though *B. N.* had limited the reversion in fee to himself, yet the words did not operate, for the use resulted by operation of law. And all the Judges agreed, that after the surrender to the uses of the settlement, the reversion still continued in the husband; and that no alteration or change of estate happened in this case.

Roe v. Griffith, 4 Burr.
1952.

Vide Thrustout v. Cunningham,
Tit. 38. c. 4.

§ 76. It appears somewhat doubtful, whether limitations in the nature of springing and shifting uses are good in surrenders of copyholds. It may be observed, that if limitations of this kind are not good, great inconveniencies must arise, as the usual practice for a

Vide *Fearne*
Cont. Rem.
416.

long time past has been, to insert a covenant in marriage settlements, to surrender copyholds to the same uses to which the freehold estates are limited; and, in most of such settlements, there are springing and shifting uses.

A Surrender
is sometimes
supplied in
Equity.
Anon.
2 Freem. 65.

§ 77. It has been long settled, that a court of equity will supply the want of a surrender of a copyhold estate, in favour of a purchaser for a valuable consideration, against the party who ought to make the surrender, and also against his heir.

Barker v.
Hill, 2 Cha.
Rep. 218.

§ 78. *A.* contracted with *B.* for the purchase of a copyhold estate, and paid the purchase money, and *B.* agreed to surrender the premises at the next court, but died before a court was held, or any surrender made. Upon a bill in Chancery by the purchaser against the heir, the court decreed, that he should surrender the premises as soon as he came of age.

Vide Taylor
v. Wheeler,
ante.

Jennings v.
Moore,
2 Vern. 609.
Blenkaine v.
Jennens,
2 Bro. Parl.
Ca. 278.
Paterson v.
Thompson,
Finch 272.

§ 79. *A.* lent *B.* 200 *l.* on a surrender of some copyhold lands, which *A.* neglected to get presented at the next court, by which it became void. *B.* afterwards sold the same lands to *J. S.* who took a surrender, which he presented, and was admitted. But it appearing that he had notice of *A.*'s right, the Lord Chancellor decreed, that *A.*'s defective surrender should be made good. And on an appeal to the House of Lords, the decree was affirmed.

Vane v.
Fletcher,
1 P. Wms. 352.

§ 80. In the case of a voluntary conveyance, a court of equity will not supply the defect of a surrender
against

against the heir, unless he has done something to prevent the acceptance of the surrender.

Courts of equity will also supply the defect of a surrender to the use of a will in many cases ; of which, an account will be given in the next title.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. II.

How Intails of Copyholds may be barred, and the Effect of Releases.

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| <p>§ 2. <i>Forfeiture and Re-grant.</i>
 7. <i>Recovery in the Manor Court.</i>
 12. <i>How such Recoveries may be reversed.</i>
 18. <i>Surrender.</i>
 24. <i>A Custom to bar by Surrender or Recovery, is good.</i></p> | <p>26. <i>A Grant of the Freehold destroys an Intail.</i>
 30. <i>How conditional Fees are barred.</i>
 32. <i>Effect of Releases.</i></p> |
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Section 1.

Tit. 10. ch. 3.
 f. 54.

WE have seen, that copyhold estates may be intailed where there is a special custom to warrant it, or rather, that they may be limited to a person and the heirs of his body, with a remainder over; and that the statute *de donis conditionalibus* co-operating with the custom, will give to such an estate all the qualities of an estate tail. In consequence of which, it has been determined, that intails of copyholds may be barred in several ways, for otherwise estates of this kind would be unalienable, which the law will not allow.

Forfeiture and
 Re-grant.

§ 2. The modes of barring intails of copyholds are principally three. First by forfeiture and regrant: as, where a tenant in tail of a copyhold commits a forfeiture,

ture, in consequence of which the lord of the manor seises it, and grants it either to the old tenant, or to another person; such grantee will acquire an estate in fee-simple.

§ 3. Upon a trial at bar in ejectment for lands held of the manor of *Wakefield*, it was admitted, that by the custom of that manor, copyhold lands might be intailed, and that the mode of barring such intails was, for the tenant in tail to commit a forfeiture, and then the lord made three proclamations, after which he seised the copyhold, and granted it to the copyholder in fee; and another custom to bar such intail was, for the tenant in tail to make a surrender to a purchaser in fee, and then for the purchaser, intending to bar the intail and the remainders, to commit a forfeiture, then the lord to seise and make three proclamations, &c. that thereby the issue in tail was barred, though the tenant in tail did not join. And this custom was found by the jury, and allowed by the court to be good.

Filkington v. Stanhope,
Sid. 314.

§ 4. This case is also reported by *Style* who mentions, that Lord Chief Justice *Roll* said, he conceived there could be no custom for this, because the seizure for a forfeiture destroyed the copyhold estate; for it was at the lord's election after the seizure, whether he would grant the estate again by copy of court roll or not; but this doctrine was confirmed in a subsequent case.

Sty. R. 452.

Gilb. Ten.
177. 299.

Grantham v.
Copley,
2 Saund.
Rep. 422 b.

§ 5. On a trial at bar, it was ruled by the court on evidence, that where *William Saville* was tenant in tail of divers copyholds in the manor of *Wakefield*, and made a voluntary lease for 21 years, without licence of the lord, to commit a forfeiture, which was presented in the copyhold court, and the lands seized into the hands of the lord, according to the custom of the manor, and *Saville* appointed the forfeiture to be for the benefit of *Arthur Saville* and his heirs. And it being proved that there was a custom to commit such forfeitures, on purpose to bar the intails of copyhold, and to transfer the lands over to any other person, although *Arthur Savill* was not admitted by the lord in the lifetime of *William Savill*, yet he had a good title; and the forfeiture was only in the nature of a surrender, or of a common recovery, and the lord could not admit any other than him to whom it was limited, by the tenant so making such forfeiture; but *cestui que use* after his admittance shall have it, and the lord cannot otherwise dispose of it; and wherever *cestui que use* is admitted, he shall avoid all mesne acts or dispositions made by the lord, as he should if a surrender had been made to his use, and he had afterwards been admitted according to the surrender.

§ 6. This custom of barring the intails of copyholds by forfeiture and regrant, is said to be peculiar to the manor of *Wakefield*. But Mr. Serjeant *Williams* observes, “ it should seem, that if there was a custom in
“ any other manor, of barring an intail of a copyhold
“ by forfeiture and regrant, it would be good; for
“ what

2 Vef. 604.
2 Saund. R.
422 b. n 1.

“ what is a good custom in one manor, must necessarily be so in another.”

§ 7. The second mode of barring copyhold intails, is by a species of common recovery, grounded on what *Littleton* says, f. 76. that plaints, in the nature of writs of assize at common law, will lie in the lords court.

Recovery in the Manor Court.

§ 8. Thus, in 23 and 24 *Eliz.* it was adjudged by the Court of Common Pleas, that where, by the custom of the manor, plaints have been made in the court of the manor, in nature of real actions, that if a recovery be in a plaint, in nature of a real action against the tenant in tail, (admitting that copyhold land may be intailed), that it should be a discontinuance, and should toll the entry of the heir in tail. For, inasmuch as plaints in nature of real actions were warranted by the custom, it was an incident which the law annexed to the custom, that such a recovery should make a discontinuance.

Brown's Case 4 Rep. 23 a.

Moo. 358.

§ 9. This determination only says, that a recovery in the lord's court shall operate as a discontinuance, and take away the entry of the heir. And Lord Chief Baron *Gilbert* says, that a recovery with voucher does not, of common right, bar the intail of a copyhold, but that, as to the intailing them, custom is requisite; so, without custom, the intail cannot be cut off. The reasons are, that because without an intended recompence in value, no recovery shall bind, and the surrenderee comes in, in the *post*, by the lord, and is not in, in the *per*, by the party, and so no warranty

Ten. 175.

can be annexed to the copyholder's estate. Besides, they have only an estate at will, to which no warranty can be annexed of common right; for no estate less than a freehold is capable by common right of having a warranty annexed to it. And, accordingly, it was adjudged in *Clun's case*, and all the judges held, that the recovery did not bind without a custom. But there is a *quære*, whether judgment was given for the plaintiff upon the principal matter or no; for it seems to have been a discontinuance, and then the defendant's entry could not be lawful. There are two other cases where this question came in dispute, but was not resolved. It is held in the case of *Church v. Wiat*, that a recovery by custom may bar, which implies that without a custom, it cannot bar. But in the case of *Oldcot v. Level*, it was agreed, that a recovery may be in the court of the lord, that will bar a copyhold; and there it is said generally, and is not put upon any custom.

T. Raym.
162.

Cro. Eliz. 380.

Moo. 753.

Pigot 103.

§ 10. The usual mode of suffering a common recovery in a copyhold court, is thus: the tenant in tail surrenders it to some other person to make him tenant to the *præcipe*, and then a plaint in the nature of a writ of entry in the *post*, is brought against him, who vouches the tenant in tail, and he vouches the common vouchee.

Keech v.
Kirby,
1 Mod. 199.
2 Mod. 32.

§ 11. It was resolved by the Court of Common Pleas in 27 Ch. 2. that where a tenant for life of a copyhold suffers a recovery as tenant in fee, it is no forfeiture of his estate; for the freehold not being concerned,
and

and it being in a court baron, where there is no estoppel, and the lord who was to take advantage of it, if it were a forfeiture, being a party, it was not to be resembled to the forfeiture of a free tenant; and that customary estates had not such accidental qualities as estates at common law, unless by special custom.

§ 12. A recovery upon a plaint, in the nature of a real action against a tenant in tail, is a discontinuance, and takes away the entry of the heir in tail. 4 Rep. 23 a.

§ 13. Where a recovery is suffered of lands held in ancient demesne, the proper mode of reversing it is by writ of deceit. How such Recoveries may be reversed.

§ 14. Thus, where a writ of deceit was brought to reverse a common recovery suffered of lands which were held of the manor of *Havering atte Bower* in the county of *Essex*, which is ancient demesne, and of which the king is lord. Rex v. Firebrace, Barnes 258.

The defendants confessed the action; and the attorney-general remitted damages, and prayed judgment.

A rule was made for judgment, *nisi causa*, which was made absolute on affidavit of service, no cause being shewn.

§ 15. A common recovery, suffered in a copyhold court, can only be reversed by petition to the lord, in the nature of a writ of false judgment. But it seems, that

that the lord of a manor is not in all cases bound to allow of any proceedings on such a petition.

Smith v.
Dean and
Chapter of
St. Paul's,
Show. Ca. in
Parl. 67.
1 Vern. 367.

§ 16. Thus, where a bill was brought, to compel the Dean and Chapter of St. Paul's, as lords of the manor, to receive a petition in the nature of a writ of false judgment for reversing a common recovery suffered in the manor court above 30 years before, whereby a remainder in tail, which the plaintiff claimed, was barred; suggesting several errors in the proceedings, and that the said lords might be commanded to examine the same, and do right thereupon. To this bill the defendant *Rugle* demurred; and the Dean and Chapter by answer insisted, that it was the first attempt of the kind, and therefore of dangerous consequence, and therefore conceived it not fit to proceed on the said petition, unless compelled thereto by course of law. That *Rugle*, being the person concerned in interest to contest the sufficiency of the common recovery, they hoped the court would hear his defence, and determine therein before any judgment were given against them; and that they were only lords of the manor to obey, &c. and prayed that their rights might be preserved.

This demurrer was allowed by the Master of the Rolls, and also by the Lord Chancellor,

Upon an appeal to the House of Lords, it was contended on the part of the appellant, that this was the only remedy which he had; for, as no writ of error or false judgment lay for reversing a recovery or judgment

ment obtained in a copyhold court, the only method was a bill or petition to the lord in the nature of a writ of false judgment, which of common right he ought to receive, and to cause errors and defects in such recovery or false judgment to be examined. And for this were cited *Moore* 68. *Owen* 63. *Fitz. N. B.* 12. 1 *Inst.* 60. 4 *Rep.* 30. in which such a record is mentioned to have been seen by *Fenner*; where the lord, upon petition to him had, for certain errors in the proceedings, reversed such judgment given in his court; 1 *Roll. Ab.* 539. 600. *Kitchen* 80. By all which, it appeared that this was an allowed, and the only remedy.

That in all cases where any party, having a right to a freehold estate, was barred by a judgment, recovery, or fine, such party of common right might have a writ of error, if the same were a court of record, and a writ of false judgment, if in a court baron or county court. And there could be no reason why a copyholder should be without remedy, when a false judgment is given; and the rather, for that in real actions, as this was, the proceedings in the lord's courts were according to those in *Westminster Hall*. That, though a common recovery was a common assurance, yet it was never pretended that a writ of error to reverse it was refused on that pretence; and, if the lord of a manor refused to do his duty, the Court of Chancery has a jurisdiction to compel him thereto. That, though common recoveries were favoured, and had been supported by several acts of parliament, yet no parliament ever thought fit to deprive the parties, bound

bound by such recoveries, of the benefit of a writ of error.

On the other side, it was argued for the respondent, that the person who suffered this recovery had a power over the estate, that she might both by law and conscience, upon a recovery, dispose of it as she should think fit: that she had suffered a recovery according to the custom of the manor, though not according to the form of those suffered in *Westminster Hall*: that the suffering of recoveries in any court, and the method of proceeding in them, are rather notional than real things; and in the common law courts they were taken notice of, not as adversary suits, but as common assurances; so that, even there, few mistakes were deemed so great but what were remedied by the statute of *Jeofails*, or would be amended by the assistance of the court. And, if it were so in the courts at *Westminster*, where the proceedings are more solemn, and the judges are persons of learning and sagacity, how much rather ought this to stand, which was suffered in 1652 during the times of disorder, and most proceedings informal, and in the *English* tongue, in such a mean court, where there were few precedents to guide them, where the parties themselves were not empowered to draw up their own proceedings as here above, but the whole was left to the steward, who was a stranger to the person concerned, and, therefore, it was hard and unreasonable, that men's purchases should be prejudiced by the ignorance, unskilfulness, or dishonesty of a steward or his clerks. That there was scarce one customary recovery in *England* which was

* 8

exactly

exactly agreeable to the rules of common law; that the questioning of this might, in consequence, endanger multitudes of titles which had been honestly purchased, especially since there could be no aid from the statutes of *Jeofails*, for they did not extend to courts baron; that there was no precedent to force lords of manors to do as this bill desired; that the lords of manors were the ultimate judges of the regularity or errors in such proceedings; that there was no equity in the prayer of this plaintiff, that, if the lord had received such petition, and were about to proceed to the reversal of such recovery, equity ought then to interpose and quiet the possession under those recoveries: that Chancery ought rather to supply a defect in a common conveyance, and decree the execution of what each party meant and intended by it, than assist the annulling of a solemn agreement executed according to usage, though not strictly conformable to the rules of law. The appeal was dismissed, and the decree affirmed.

§ 17. If lands are customary freeholds, and pass by surrender in a borough court, it is said, that a recovery of such lands suffered in the Court of Common Pleas, may be good.

Oliver v.
Taylor,
1 Atk. 474.

§ 18. Lord Coke says, if by custom copyholds may be intailed, the same, by like custom, by surrender may be cut off; and so it hath been adjudged. And, in the case of *Lee v. Brown*, it was said, that to maintain such a custom, it ought to be shewn that a form-don had been brought upon such a surrender, and

Surrender.
1 Inst. 60 b.

Poph. Rep.
128.

judgment given that it did not lie; yet it was agreed to be a strong proof of the custom, that they, to whose use such surrenders had been made, had enjoyed the land against the issues in tail.

Hill v. Upchurch,
Co. Sup. f. 12.

§ 19. In a case concerning lands held of the manor of *Northall* in *Essex*, it was agreed, that where copyhold lands may be intailed, a custom, that a surrender shall be a bar or discontinuance of such estate, is good.

§ 20. It appears to have been settled in some modern cases, that a surrender by a tenant in tail of a copyhold, will bar his issue without a special custom, unless a special custom be found that a recovery is necessary.

White v. Thornburg.
Prec. in Chan.
425.
Gilb. Rep.
107.
2 Vern. 705.

§ 21. *A.* being a copyholder, covenanted by marriage articles, to surrender to trustees, to the use of himself for life, remainder to his wife for life, remainder to the heirs-male of his body, remainder to his own right heirs. *A.* died without having made any surrender, leaving *B.* his son, and *M.* his daughter. *B.* surrendered his copyhold for payment of his debts.

Lord *Harcourt* was of opinion, that the copyhold being intailed by the articles, could not afterwards, by a bare surrender, be defeated, without a particular custom had been found to have warranted it. But this decree was reversed by Lord *Cowper*, who said that, *prima facie*, it must be taken, that a surrender by such tenant in tail will bind his issue, unless a particular

ticular custom were found that there ought to have been a common recovery.

§ 22. In the case of *Carr v. Singer*, three judges, 2 Ves 603. against Lord Chief Justice *Willes*, held, that where copyholds are intailable, and the custom has not prescribed any mode of barring the intail, it may be done by surrender. But the Lord Chief Justice thought that, in such a case, a recovery was the proper mode. Vide *Martin v. Mowlin*, 2 Burr. 979.

§ 23. A surrender to the use of a will, not only effectuates the will, but also operates as a bar to an estate tail; of which, an account will be given in Title 38. Devise.

§ 24. A custom of barring estates tail in copyholds by surrender, may subsist concurrently with a custom to bar by a recovery in the lord's court. A Custom to bar by Surrender, or by Recovery, is good.

§ 25. In ejectment for a copyhold estate, a case was made for the opinion of the court, wherein it was stated, that within the manor of *Collingham*, where the lands lay, there were two customs of barring estates tail, which had been used within the same manor time out of mind; one was by common recovery, the other, by a surrender in fee to a purchaser. That *Edward Smalley*, on the marriage of his son *Robert*, surrendered the premises to his son and *Susannah* his wife, and their heirs, in general tail. They had issue *Edward Smalley* their son and heir, who, after their deaths, became tenant in tail, and surrendered the premises according to the custom of the manor to *John Mills* and his heirs

Everall v. Smalley, 1 Will. R. 26. 2 Stra. R. 1197.

P p 2 in.

in fee; who dying, left *Robert Mills* his heir, and plaintiffs lessor. The defendant was *Henry Smalley*, son and heir of *Edward Smalley*, who surrendered the premises to *John Mills* as aforesaid. And whether the defendant *Henry Smalley*, the heir in tail, was barred by the surrender in fee, where there is also a custom within the same manor of barring by recovery, was the question.

After two arguments, it was unanimously resolved by the court, that the heir in tail was barred.

Lord Chief Justice *Lee*.—"It has been said at the Bar, that a custom in a manor to bar a tail by surrender, ought only to be allowed *ex necessitate, i. e.* when in the same manor there is no usage to bar by a recovery: there is, indeed, great diversity in the books as to barring copyhold intails; but in none of them can I find any case to warrant the distinction. The latter opinion of judges is, that in manor courts, where a real action can be brought, a recovery in such court will be a good bar. I own, I can see no reason why the custom to bar by surrender should not be good; but it is objected to barring intailed copyholds by recovery; for recompence in value does not extend to copyholds, the issue in tail of copyholds not being barred in respect of the recovery in value; but, to prevent the inconvenience of perpetuities, these two customs may well stand together, and are but two different ways of barring the intail; and I think the surrender the best."

Chapple, Just. to the same effect; “ And the
“ customs must be taken to be both coeval, we can-
“ not say which is prior; they seem equally conve-
“ nient to prevent perpetuities.”

Wright, Just.—“ It seems to be agreed by the
“ counsel on both sides, that an intail of a copyhold
“ may be barred by a recovery, or by a surrender in
“ fee within a manor, where there is no custom for
“ barring by recovery; but it is insisted on one side,
“ these two customs cannot stand together. It has
“ been a controverted question, since I attended this
“ bar, whether copyholds could be intailed: it is now
“ at this day said they may, by custom co-operat-
“ ing with the statute *de donis*; but this is quite new
“ to me. The statute *de donis* created no new estate.
“ Copyholders are no more than tenants at will, and
“ it is by the will of the lord and his mere consent
“ only, that they are permitted to limit their copy-
“ holds in this or that way, either by surrender, or as
“ the custom happens to be. And surely the lord,
“ who of his mere will permits a limitation to J. S.
“ and the heirs of his body, may permit J. S. to
“ alien the same by surrender: nobody ever thought
“ that copyholds were within the statute *de donis*;
“ barring intails in copyholds have been much talked
“ of; but I think there is no such thing. It is only
“ a way invented and permitted by the lord, to
“ get rid of the intail: the true reason of the issue in
“ tail being barred is the recovery over in value;
“ now, there can be no such thing in the case of a

“ copyhold : I think the surrender is a better way, if
 “ the lord permits it, because cheaper.”

N. B. *Wright*, Justice, declared, that there was no possibility of understanding this matter by the books, and said he had laboured much to understand them, and could not.

Dennison, Just.—“ Nothing more clear than that
 “ tenant in tail of a copyhold may bar his issue by
 “ surrender : and, where there may be a real action,
 “ there may be a recovery. *Co. Lit.* 60 b. These
 “ are only two different conveyances ; and it might as
 “ well be said that, at common law, where there is a
 “ fine, that will bar the issue as well as the recovery,
 “ therefore one of them must be void. A surrender,
 “ I think, is a more natural way of conveying copy-
 “ holds than a recovery, and I cannot see any use
 “ a recovery is of, but only to create greater ex-
 “ pence.”

Doe v.
Truby,
 2 Black R.
 944. S. P.

A grant of
 the Freehold
 destroys an
 Intail.

§ 26. A grant of the freehold of a copyhold estate to a person having an estate tail in such copyhold, will operate so as to extinguish the estate tail.

Dunn v.
Green,
 § P. Wms. 9.

§ 27. A copyholder in tail accepted a grant from the lord of the manor of the freehold and fee simple to him and his heirs, and died indebted by bond wherein the heirs were bound ; and, on a bill brought by the bond creditor for satisfaction out of the assets left by the obligor, the question was, whether the
 premises

premises were affets by descent, and liable to the bond ?

The Lord Chancellor, after time taken to consider of it, thus delivered his opinion.—“ Unless it be expressly found that the custom of the manor allows of intails, then this is a fee conditional, and plainly merged by the grant of the freehold in fee : but, supposing the custom of the manor *does* warrant intails, yet the copyhold is extinguished, because in the eye of the law that is but an estate at will, and must be merged by the grant of the freehold. The premises by such grant are severed from the manor, consequently the custom of the manor cannot corroborate the legal estate at will. The copyholder cannot hold of himself ; and the copyhold, though intailed, is swallowed up in the greater estate of the freehold : and as the tenant after such time as he took the grant, did not himself continue a copyholder, so his son, on the descent of the freehold, is likewise no copyholder, which may be said from son to son *ad infinitum*. Moreover, if the intail of the copyhold be not extinguished, it will be a perpetuity ; since the only proper way of barring the intail of a copyhold is, by recovery in the lord’s court ; but, after such severance as in the present case, no recovery can be suffered in the lord’s court.”

§ 28. At the end of this case there is a note in which it is said, if *A.* be copyholder in tail remainder to *B.* in fee, and *A.* takes a grant of the freehold from the

3 P. Wms.
11. Note F.

the lord, to him and his heirs, and dies without issue, is not *B.* in whom there was once a vested remainder in fee of the copyhold premises, intituled to the same? In answer to this Mr. *Cox* says; "With respect to the
 " quere made in the note above, it seems that the
 " remainder man could have no equity against the
 " tenant in tail (who had power to bar the remainder
 " one way or other,) upon the principle of *Cann v.*
 " *Cann.*" 1 *Vern.* 480.

§ 29. This doctrine has been confirmed in the following modern case.

Challoner v.
Murhall,
 2 Vol. Jun.
 524.

William Murhall surrendered a copyhold to the use of himself and his wife for their lives and the life of the survivor, remainder to the use of *William* their eldest son in tail, remainder to *John* their second son in tail, with several remainders over. *William Murhall* the eldest son died without issue. The Duke of *Bridgewater* who was seised in fee of the manor granted the said premises to the said *William Murhall* the elder, his heirs and assigns for ever, freed and enfranchised from all services. *William Murhall* died without disposing of the said premises, or the freehold thereof, by which means they descended to *John Murhall*, who by his will charged the same with the payment of his debts and legacies, and devised it to *Thomas Murhall*. In this manor no recoveries were suffered, but estates tail were barred by surrender. The bill was filed by legatees; the Master reported that the premises were charged by the will; to which report exceptions were taken,

The Lord Chancellor said it was impossible that any equity could keep alive this intail. *Thomas Murball* (the next remainder man in tail,) never could have had a bill against his father and elder brother. No one could have a right against the tenant in tail. The case from Lord *Jeffries* proved a plain proposition, that where the interest of the lord of the manor was united with the copyhold in tail, there must be a merger, for the method of barring it could not exist.

1 Vern. 392.

458.

§ 30. It has been stated that where the custom of a manor does not admit of an intail of a copyhold, a surrender to the use of a person and the heirs of his body, gives him a conditional fee; in which case a surrender after issue had will bar the estate.

How conditional Fees are barred.

Tit. 2, ch. 1. f. 5.

§ 31. A surrender of copyhold lands was made within the manor of *Stevenson* to the use of J. S. and the heirs of his body: and after issue had he surrendered the lands to a stranger. It was agreed by all the Justices that this was a conditional fee at the common law; and that after issue, he might alien the lands.

Stanton v. Barney, Co. Sup. f. 12.

§ 32. Although in general a copyhold estate can only be aliened by surrender and admittance, yet Lord *Coke* says, that where a man hath but a right to a copyhold, he may release it by deed, or by copy, to one that is admitted tenant *de facto*.

Effect of Releases. 1 Inst. 59 b. *Gilb. Ten.* 300.

§ 33. A copy-

Title XXXVII. *Alienation by Custom.* Ch. ii. § 33.

§ 33. A copyholder surrendered his copyhold lands out of court to the use of another and his heirs; upon certain conditions. At the next court the surrender was presented, but in the presentment the conditions were omitted: and he to whose use the surrender was made being dead, the lord, by the steward, according to the custom, admitted his daughter and heir, who entered. The person who made the surrender, by his deed released to the daughter being in possession, and afterwards entered upon her; and if his entry was lawful or not was the question. It was adjudged that his entry was not lawful. The great doubt was, if by the said release by deed, the customary right of the copyholder was extinct, and he who made the surrender barred of his right; and it was objected that *Littleton* says, that a copyholder cannot alien his land by deed, but if he will alien, he ought to surrender; and that such tenants are called tenants by copy, because they have no other evidence concerning their tenements but the copies of the court rolls, and it was said that, that excludes all releases by deed, for then they would have other evidences than the court rolls. Also it was said that he who purchases the land, may, upon searching the rolls, be advised if the title of the land be good; but if a release by deed should extinguish rights, then it would be very dangerous to purchasers, for that doth not appear in the rolls. To which it was answered and resolved that the release in the case at bar extinguished the right of the copyholder. And their reason was, because he to whom the release was made was admitted to the tenements and copyhold in possession; so that a release of the customary

